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No. 132

In The
Supreme Court of the United States

SUSAN HERTZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROGER B. HERTZ, DECEASED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should this Court grant certiorari where the Sixth Circuit Court of Appeals established a new rule of law governing the accrual of claims under the Federal Tort Claims Act in plane crash cases, which decision conflicts with both a decision of this Court and decisions of other Circuit Courts of Appeals and which, if not reversed by this Court, will result in substantial prejudice to the Petitioner and lead to the filing of numerous unnecessary Administrative Claims. Petitioner's husband died in a plane crash. Three weeks after the crash Petitioner acquired knowledge that the crash may have been caused by the actions of the air traffic controllers, who are employees of the United States government. Petitioner filed an Administrative Claim against the government within two years of learning facts evidencing possible government involvement in the crash but more than two years from the date of the crash. The Sixth Circuit found her claims to be time-barred and created a rule that in plane crash cases, a claim under the Federal Tort Claims Act accrues on the date of the crash if, within the subsequent twenty-four months, the claimant should have been able to determine whether to file an Administrative Claim. As stated above, such a rule is without precedent, conflicts with other relevant decisions, and review by this Court is warranted.

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding.

Petitioner is an individual and therefore no corporate disclosure statement is necessary.

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The opinion of the United States Court of Appeals for the Sixth Circuit is published at 560 F.3d 615. (Apx. 1a-7a.) The opinion and order of the United States District Court Eastern District of Michigan is unpublished, but unofficially reported at 2007 WL 1041242 (April 6, 2007). (Apx. 8a-11a.)

BASIS FOR JURISDICTION

The judgment and opinion of the Sixth Circuit Court of Appeals was entered on March 31, 2009. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2401(b), part of the Federal Tort Claims Act ("FTCA"), provides as follows:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(Apx. 12a.)

STATEMENT OF THE CASE

I. BACKGROUND FACTS

This is a wrongful death suit brought under the FTCA against the United States for negligence and reckless conduct by air traffic controllers which caused a plane crash. On May 31, 2004, Petitioner/Plaintiff Susan Hertz' ("Plaintiff" or "Petitioner") husband, Roger B. Hertz, was a passenger on board an amateur-built airplane for a business trip from Michigan to Oregon. (Complaint, ¶ 9). The plane was flown by a licensed pilot and there was one other passenger on board in addition to Plaintiff's husband. (National Transportation Safety Board's Factual Report ("NTSB Report"), p. 1; Apx. 15a.) During the flight, the pilot requested the air traffic controllers to provide vectors around adverse weather and informed air traffic control that the aircraft was not equipped with weather radar. (*Id.*, p. 1a; Apx. 16a-17a.) Despite this explicit request, the air traffic controllers failed to provide adverse weather avoidance as they are required to do. (*Id.*, pp. 1a, 1f; Apx. 16a, 18a.) Instead, the air traffic controllers' instructions, which the pilot followed, directed the aircraft into level-six thunderstorm activity, the most extreme thunderstorm classification. (*Id.*, p. 1a; Apx. 17a-18a.) Upon entering this adverse weather, the plane went into a spiral descent and crashed in the woods near Vermontville, Michigan, killing all on board. (*Id.*, pp. 1b, 1c; Apx. 19a-20a.)

On June 25, 2004, in a telephone conversation with the NTSB investigator-in-charge, Plaintiff learned for the first time that the NTSB's investigation (the only investigation permitted by law) suggested that the

plane crash, and, accordingly, her husband's death, may have been caused by the actions of air traffic control. (Affidavit of Susan Hertz, ¶¶. 5-9; Apx. 34a-35a.) This was the first time Plaintiff learned (or could have possibly known) that air traffic control may have been the cause of her husband's death.

Plaintiff retained counsel (who were subsequently replaced by her current counsel) in July 2004 to prosecute any claims she had relating to her husband's death. (*Id.*, ¶10; Apx. 36a.) On June 9, 2006, Plaintiff served an Administrative Claim, known as a Form 95, relating to her husband's death on the Federal Aviation Administration ("FAA"). (Plaintiff's Form 95; Apx. 40a.) The FAA denied Plaintiff's claim as untimely because it was served more than two years after the date of the accident. (June 15, 2006 Letter from FAA; Apx. 107a.)

II. DISTRICT COURT CASE AND DECISION

On December 8, 2006, Plaintiff filed a wrongful death action under the FTCA against the United States in the United States District Court for the Eastern District of Michigan alleging air traffic control negligence. The district court had jurisdiction over the matter pursuant to 28 U.S.C. §§ 1331 and 1346(b). The United States moved to dismiss the complaint on statute of limitations grounds because the Administrative Claim was not filed within two years of the decedent's death. (Defendant's Motion to Dismiss.) Plaintiff opposed the motion. (Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss.) Oral argument was held. (April 5, 2007 Transcript.)

In response to the motion, Plaintiff argued that her claim was not barred because it did not accrue until she first became aware (or could possibly have become aware) that the conduct of air traffic controllers may have caused her husband's death. On April 6, 2007, the district court granted the United States' motion and dismissed Plaintiff's complaint, essentially finding that the claim accrued on the date of the accident. (Apx. 10a.) The district court also noted that Plaintiff had 22 months in which to file her claim after she spoke with the NTSB investigator-in-charge. (Apx. 10a.)[1] Plaintiff timely appealed the district court's decision to the Sixth Circuit Court of Appeals.

III. DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS

On March 31, 2009, the United States Court of Appeals for the Sixth Circuit affirmed the district court's order granting Defendant's motion to dismiss. (Apx. 1a.) The court held that "an [FTCA] claim accrues when a plaintiff possesses enough information with respect to her injury that, '[h]ad [she] sought out independent legal and [expert] advice at that point, [she] should have been able to determine in the two year period whether to file an administrative claim.'" (Apx. 4a-5a, cites omitted.) The court noted that in cases such as medical malpractice claims, a plaintiff might need to know of doctor-caused harm in order for his or her claim to accrue, but "deaths by plane crashes are different." The court then stated that "plane crashes by their nature typically involve negligence

[1] Plaintiff also made an equitable tolling argument which was rejected by the lower courts and is not at issue in this petition.

somewhere in the causal chain; and the mere fact of the event is thus typically enough to put the plaintiff on inquiry notice of his claim." (Apx. 5a, emphasis in original.) The court found that because Plaintiff knew within the two year period following the crash that she had a claim against the government, her claim accrued on the date of injury, *i.e.*, on the date of the crash. (Apx. 6a.) In so holding, the Court of Appeals created a new rule of law that an FTCA claim arising from a plane crash accrues on the date of the crash if the claimant was able to determine, or should have been able to determine, anytime within the subsequent two years that he or she had a claim against a governmental agent.

ARGUMENT

The FTCA grants a limited waiver of sovereign immunity and allows tort claims against the United States to proceed in the same manner and to the same extent as against a private individual under like circumstances. To pursue a FTCA claim against the United States the claim, known as an "Administrative Claim," must be "presented in writing to the appropriate federal agency within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b).[2] Whether

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[2] Courts have interpreted the FTCA as requiring that a plaintiff *both* file an Administrative Claim within two years of when the claim accrues *and* bring suit within six months of the denial of that Administrative Claim. *See*, e.g. *Schuler v. United States*, 628 F.2d 199 (D.C.Cir., *en banc*, 1980). It is undisputed that Plaintiff filed her complaint within six months of the denial of her Administrative Claim. Therefore, only the first of these two requirements is at issue in this case.

Plaintiff's Administrative Claim was timely depends on when her claim is deemed to have accrued.

The question of when a claim accrues under the FTCA is an important issue of federal law. This Court has rejected the argument that an FTCA claim always accrues on the date of the injury at issue. *United States v. Kubrick*, 444 U.S. 111; 100 S. Ct. 352; 62 L. Ed. 2d 659 (1979). In *Kubrick*, this Court found that an FTCA claim accrues when the plaintiff knows both the existence and the cause of his injury. Since *Kubrick* was decided, many Circuit Courts have applied *Kubrick* to determine claim accrual under the FTCA. The Sixth Circuit's holding that an FTCA claim against the government arising from a plane crash accrues on the date of the crash if the record reveals that the plaintiff should have been able to determine in the two year period following the crash whether to file an administrative claim is inconsistent with *Kubrick* and other Circuit Courts' interpretation of *Kubrick*. Strangely, the Sixth Circuit's rule looks to determine when the plaintiff knew or should have known of a possible governmental cause, the touchstone of the discovery rule, as discussed below. But the court's rule does not then utilize this date to start the accrual period, as should be the case, but instead uses it to determine that if this happened within two years of the crash, the discovery rule does not apply. In other words, the Sixth Circuit finds the discovery date to be relevant only because the court may then render it irrelevant for claim accrual purposes.

The Sixth Circuit's holding is inconsistent with *Kubrick's* finding that a claim accrues when the plaintiff knows both the existence *and the cause* of his

injury. The Sixth Circuit's holding also conflicts with other Circuits' holdings that claims brought under the FTCA accrue only when the plaintiff knows of the decedent's death *and* its potential causal connection with the government. For these reasons, as discussed in more detail below, review and reversal by this Court is warranted. Sup. Ct. R. 10(a) and (c).

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH A RELEVANT DECISION OF THIS COURT.

Although the general rule in FTCA actions is that the two-year period to file an Administrative Claim begins to run on the date of the injury at issue, *Kubrick*, 444 U.S. at 120, exceptions have evolved to avoid the injustice that would result from the application of this rule in a rigid, inflexible manner, for example, when a plaintiff knows she has been injured but does not yet know the cause of the injury. To remedy this injustice, this Court has held that the accrual of a cause of action under the FTCA occurs when a plaintiff has discovered *both* her injury *and* its cause. *Id.* (emphasis added). This judicial exception is commonly referred to as the "discovery rule." *See Chomic v. United States*, 377 F.3d 607, 613 (6th Cir. 2004); *McIntyre v. United States*, 367 F.3d 38, 51-52 (1st Cir. 2004).

A. *Kubrick* Held That a Claim Accrues When the Plaintiff Knows *Both* Her Injury *and* its Cause.

In *Kubrick*, a veteran brought suit under the FTCA to recover for hearing loss allegedly caused by medical malpractice in a Veterans Administration ("VA")

hospital. *Kubrick*, 444 U.S. at 113-15. In April 1968, the plaintiff was admitted to the VA hospital for treatment of an infection of the right femur. Following surgery, the infected area was irrigated with neomycin, an antibiotic. Approximately six weeks after the plaintiff was discharged he noticed some hearing loss and was diagnosed with bilateral nerve deafness. *Id.* Thereafter, in January 1969, after looking at plaintiff's VA hospital records, a specialist informed the plaintiff that it was highly possible that his hearing loss was the result of the neomycin treatment administered at the VA hospital. Based on this information, the plaintiff sought additional benefits from the VA. *Id.*

In June 1971, during the course of the plaintiff's unsuccessful administrative appeal from the VA's denial of his claim for benefits, another private physician told the plaintiff that the neomycin that caused his injury should not have been administered. *Id.* In 1972, the plaintiff filed a malpractice suit against the government under the FTCA.

The government moved to dismiss the plaintiff's complaint arguing that the claim was barred by the two year statute of limitations because it accrued in January 1969—when Kubrick learned that his hearing loss resulted from the neomycin. *Id.* at 115. The district court denied the motion, and the Court of Appeals for the Third Circuit affirmed, both holding that the plaintiff's claim did not accrue until June 1971, when he found out that the neomycin should not have been administered by the VA doctor. *Id.* at 116. This Court, however, reversed the lower court's decisions and held that that the plaintiff's claim accrued earlier, when he learned that the neomycin

treatment caused his hearing loss. *Id* at 115, 119. This Court reasoned that the two year period to bring an FTCA claim begins to run when the plaintiff has discovered the essential facts of his injury and its cause. *Id.* at 121.

In *Kubrick*, the plaintiff's claim did not accrue as early as the date on which the neomycin was administered. Nor did it accrue later when the plaintiff learned that the administration of neomycin may have been improper. Instead, his claim accrued when he learned that his hearing loss may have been caused by the actions of a government employee in administering neomycin, knowledge he gained months after the administration of the medication, and after discovery of the injury. *Id.* at 115, 119. Thus, the Administrative Claim period does not begin to run until there is knowledge of the cause of an injury (the administration of neomycin there; the activities of air traffic control here), which may come after discovery of the injury (hearing loss there; death by plane crash here) and before discovery of legal culpability (medical malpractice there; air traffic control negligence here). It simply cannot be said after *Kubrick* that an FTCA claim accrues on the date of injury, regardless of knowledge, or lack of knowledge, as to its cause.

B. The Sixth Circuit's Opinion Ignores *Kubrick's* Knowledge of Cause Requirement.

The Sixth Circuit's decision ignores the cause element of claim accrual acknowledged in *Kubrick*. Its explanation for not following *Kubrick* is that death by plane crashes are different, for purposes of claim accrual, than death by, for example, cancer. (Apx. 5a.)

Yet, *Kubrick's* claim accrual rule is not specifically limited to medical malpractice claims, and has been applied in cases involving claims other than malpractice. *See e.g., Skwira v. United States*, 344 F.3d 64, 74 (1st Cir. 2003) (applying discovery rule in negligent supervision case involving plaintiff's death due to criminal conduct of nurse at VA hospital); *Rakes v. United States*, 442 F.3d 7 (1st Cir. 2006) (wrongful disclosure and negligent supervision claims under the FTCA accrue only when person in the plaintiff's position has sufficient facts to permit reasonable person to believe there is a causal connection between the government and the injury); *McIntyre, supra,* 367 F.3d 38 (discovery rule applied in wrongful death case against federal government involving negligence in revealing victim's status as FBI informant); *Ramming v. United States*, 281 F.3d 158, 162 -63 (5th Cir. 2001) (malicious prosecution claim brought under FTCA only accrues when plaintiff is aware of the injury and the connection between the injury and the government's actions); *Garza v. United States,* 284 F.3d 930, 934 (8th Cir. 2002) (negligent supervision FTCA claim accrues only when plaintiff has reason to believe he has been injured by an act or omission of the government). This makes sense because *Kubrick's* logic applies to all types of cases in which the injured party does not (and could not) immediately know the cause of his or her injury, regardless of the nature of the claim.

The Sixth Circuit's analysis is inconsistent with *Kubrick*. The court took the date of injury, added two years, and asked whether the plaintiff could have determined whether to file a claim within that two year period. Under the Sixth Circuit's rationale, if a claimant learns of the potential cause attributable to

the government one year and 364 days after the accident, he or she must file the Administrative Claim the very next day (day 730) or be time-barred, because the knowledge acquired on day 729 (*i.e.*, one year and 364 days) causes the claim to accrue retroactively. This is not a proper claim accrual analysis under *Kubrick*.

In *Kubrick*, this Court found that for statute of limitations purposes under the FTCA, a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should not receive identical treatment.

> That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and *the facts about causation may be in the control of the putative defendant*, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of critical facts that he has been hurt or *who has inflicted the injury*. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask.

Kubrick, 444 U.S. at 122. (emphasis added).

Both the Sixth Circuit and the district court focused on Plaintiff's knowledge of the injury itself and her ignorance of her legal rights, and overlooked her ignorance as to who caused the injury. Although death by plane crash is different than death by cancer, this is irrelevant to the claim accrual issue and certainly should not mean that every claimant in an airplane crash must assume that government conduct may have played a role in the crash. The courts below were

required to base their claim accrual decision on when Plaintiff could have acquired possession of the critical facts regarding who inflicted her injury. *Id.* This is especially true because the facts about causation were in the exclusive control of the putative defendant, *i.e.*, the United States.[3] More specifically, the lower courts were required to analyze when Plaintiff should have known that the government may have caused the crash and held that it was then, and only then, that the cause of action accrued under the FTCA. Their failure to do so and the Sixth Circuit's new claim accrual rule conflict with this Court's analysis and holding in *Kubrick*, and warrants review, and ultimately reversal, by this Court.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE FIRST, FIFTH, SEVENTH, AND EIGHTH CIRCUIT COURTS OF APPEAL ON THE SAME SUBJECT MATTER

The Sixth Circuit refused to follow the rule set forth in *Kubrick,* and held that Plaintiff's claim

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[3] In the weeks between the accident and when the NTSB investigator-in-charge advised Plaintiff that air traffic control conduct may have led to the crash, Plaintiff could not have conducted *any* investigation into the actions of air traffic control personnel; by law the NTSB had exclusive access to the information necessary to allow a reasonable person to conclude that air traffic control conduct caused the crash. *See* 49 C.F.R. § 831.2(a)(1). This is still the law. Until the NTSB releases information concerning an accident investigation, only the investigator-in-charge can release or approve the release of information to any person who is not a party to the investigation. 49 C.F.R. § 831.13(b). Petitioner was not a party to the NTSB's accident investigation.

accrued on the date of the crash. The court supported this refusal by distinguishing negligent air traffic control from negligent medical treatment.[4] *Kubrick* and its progeny, however, have made it clear that the "discovery rule"—or "inquiry-notice rule" as the Sixth Circuit now calls it—applies to cases outside of the medical malpractice arena. In other words, other circuits have held that non-medical malpractice claims brought under the FTCA do not accrue until the plaintiff knew or should have known of her injury and the cause attributable to the government. This Court could make this the clear rule by granting certiorari in this case.

A. The First, Fifth, Seventh, and Eighth Circuits Consider Knowledge of Government Cause When Determining Claim Accrual.

The First, Fifth, Seventh, and Eighth Circuit Courts of Appeal have applied *Kubrick's* holding that a claim accrues when the plaintiff knows or should have known of his injury and its cause to cases outside of the medical malpractice context, and have held that FTCA claim accrual awaits knowledge not just of *a* cause, but of government cause.

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[4] Although the First Circuit Court of Appeals in *Skwira* also distinguished between medical malpractice and other types of claims, as discussed *infra*, it noted that one is *more* likely to know of the cause of an injury in medical malpractice claims than in other sorts of claims, which argues in favor of expanding the cases in which the discovery rule applies, not restricting it, as the Sixth Circuit has done.

1. The Seventh Circuit Court of Appeals

Shortly after *Kubrick* was decided, the Seventh Circuit ruled on the issue of whether the discovery rule only applied to FTCA medical malpractice cases. *Stoleson v United States,* 629 F.2d 1265 (7th Cir 1980). In *Stoleson,* an occupational exposure case, the court held that the discovery rule is not limited to malpractice cases and found that the plaintiff's claim did not accrue until she had knowledge of causation. *Id.* at 1270-71. Indeed, the court found that the FTCA statute of limitations did not begin to run until the point in time in "at which [the plaintiff] could have pursued a claim against the Government." *Id.*

Several years later the Seventh Circuit further analyzed *Kubrick*, and held that when there are two causes of an injury, and only one is attributable to the government, the knowledge required to start the FTCA limitations period is knowledge of the government cause, not knowledge of the other cause or causes. *Drazen v. United States,* 762 F.2d 56, 59 (7th Cir. 1985). Although *Drazen* was a medical malpractice case, the court's opinion included a hypothetical analogy that is applicable to this case.

> A postal van knocks a man down. No one sees the accident, and the hospital to which the body is taken gives out the cause of death as a fractured skull. That is one cause but the postal service is another; and unless the decedent's survivors know or should know that the postal service caused the decedent's head to hit the pavement, just knowing that he died from a fractured skull does not start the statute of

> limitations running [for purposes of bringing a claim under the FTCA].

Id. The Seventh Circuit found that under this hypothetical, the plaintiff's claim would accrue when he or she first had reason to believe that an act or omission by the government had been a cause of the decedent's death, not when they knew an accident fractured the decedent's skull. The clock begins to run "when the government cause is known or when a reasonably diligent person reacting to any suspicious circumstances of which he might have been aware would have discovered the government cause." *Id.*

Here, the obvious cause of Plaintiff's decedent's death was the plane crash. There are numerous potential underlying causes of a plane crash, however, such as pilot error, pilot illness, mechanical failure, product defect, extreme weather, etc. The potential cause for purposes of the FTCA—air traffic control conduct in the instant case—which turned out to be the actual cause of the crash, was unknown (and unknowable) to everyone but the NTSB for the first 25 days after the crash. Under these circumstances, just knowing that Plaintiff's decedent died in an airplane crash did not start the statute of limitations running under *Kubrick*, as analyzed by other Court of Appeals, such as the Seventh Circuit. The clock did not start to run until Plaintiff knew or should have known that the actions or inactions of government personnel may have caused the crash.

2. The First Circuit Court of Appeals

The First Circuit Court of Appeals has held on numerous occasions that knowledge (actual or imputed

under a reasonable person standard) of government cause is the critical element in FTCA claim accrual. One of the first non-medical malpractices cases that made this distinction after *Kubrick* was *Attallah v. United States*, 955 F.2d 776 (1st Cir. 1992). There, the plaintiffs sued the government to recover damages for property theft following the robbery and murder of a courier by United States custom agents. *Id.* at 778. The First Circuit rejected the government's claim that the plaintiffs were armed with the crucial facts concerning their injury (loss of assets) and its cause (abduction and murder of courier) when the courier's body was found. Instead, the court found that the plaintiffs' cause of action did not accrue until government involvement in the abduction and murder were known, *i.e.*, criminal indictments were brought against the government agents.[5] *Id.*

Here, the Sixth Circuit should have followed the reasoning of the First Circuit and rejected the government's argument that Plaintiff's claim accrued when she was armed with facts concerning her injury (the decedent's death) and its cause (plane crash). Like the First Circuit, the court should have held that Plaintiff's cause of action did not accrue until she was aware (or through reasonable diligence could have become aware) of the facts concerning air traffic control's involvement in the crash.

After *Attallah*, the First Circuit thoroughly analyzed *Kubrick* and applied the knowledge of

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[5] Plaintiff's claims were ultimately barred on grounds unrelated to the FTCA statute of limitations.

government cause requirement to a non-medical malpractice wrongful death case in *Skwira*, holding:

> Outside the medical malpractice context, a claim accrues under the FTCA once a plaintiff knows, or in the exercise of reasonable diligence should know, (1) of her injury and (2) sufficient facts to permit a reasonable person to believe that there is a causal connection between the government and her injury.

344 F.3d at 82. *Skwira* involved a wrongful death case against the government for the death of a patient at the VA Medical Center. *Id.* at 67. Five years after the death, a nurse was convicted of murdering the decedent by injecting lethal doses of a drug to stimulate natural death. *Id.* The decedent's survivors filed suit one year later. *Id.* at 70. The court found that the cause of action accrued, at the latest, on the day after the patient's autopsy—which was after the date of death—because the plaintiffs then learned that the decedent did not die of causes listed on the death certificate.[6] *Id.* at 80. Since *Skwira*, the First Circuit has continued to apply what it refers to as the "discovery rule" to define FTCA claims accrual as distinct from the date of injury.

In a 2004 First Circuit case, a decedent's personal representative brought an action against the United States for negligence for revealing an informant's identity, the disclosure of which ultimately led to the

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[6] The court of appeals affirmed the trial court's dismissal of the plaintiffs' claim because they did not file their administrative claim within two years after the autopsy. *Id.* at 83.

decedent/informant's murder by gang members. *McIntyre*, *supra*, 367 F.3d 38. The court held that claims against the government by the murder victim's family accrued when the family learned that the FBI disclosed the victim's status, not earlier when they learned that the victim had been murdered. *Id.* at 54-56.

In analyzing whether the discovery rule extended the time in which to file an Administrative Claim, the *McIntyre* court examined this Court's holding in *Kubrick*. It acknowledged that once the claimant has "knowledge of the fact of injury *and the identity of the party that caused* [it], . . .", 367 F.3d. at 52 (emphasis added), the limitations clock begins to run. "The same is not necessarily true of plaintiffs who are ignorant of the facts, particularly when the government may be in possession or control of the necessary information." *Id.* The question posed by the court was whether a reasonable person in the plaintiff's position, after conducting a diligent investigation, would have uncovered a sufficient factual basis to believe, *more than two years prior* to the filing of plaintiff's Administrative Claim, that the FBI was the source of the leak of the decedent's identity to the gang members. The court answered no. *Id.* at 54.

In the case at bar, a reasonably diligent investigation could not have disclosed a connection between the plane crash and the government's acts at any point before the NTSB provided information about its preliminary conclusions to the decedent's widow. As mentioned above, the NTSB, a federal agency, was in exclusive possession and control of the investigation into the plane crash and the Plaintiff was not a party to the NTSB's accident investigation.

The First Circuit again analyzed the applicability of the discovery rule to FTCA claim accrual in *Rakes*, *supra*, 442 F.3d 7. *Rakes* involved claims by extortion victims who alleged that the extortionists were informants shielded by the FBI, and therefore the government was liable for plaintiffs' money losses. *Id.* at 11. The First Circuit reiterated that the discovery rule governs claim accrual under the FTCA where the cause of an injury is unknown (or unknowable) to the plaintiff for some time after the injury occurs. *Id.* at 19. *Rakes* acknowledged that this Court applied the discovery rule in the medical malpractice context in *Kubrick,* and that the First Circuit has applied the discovery rule outside of the medical malpractice context, making it a rule of general application. *Id.*, citing *Kubrick*, 444 U.S. at 111. It also acknowledged that the First Circuit has continuously held that the "start of the FTCA's limitation period may be delayed during a period in which an injured party has no way of knowing that he has been injured or that it was the government who caused the injury." 442 F.3d at 11.

Echoing the holding in *McIntyre*, the First Circuit panel in *Rakes* employed the "objective observer" standard in determining whether the injured party knew, actually or constructively, sufficient facts so as to permit a reasonable person to believe that there was a causal connection between the injury and the federal government. *Id.* at 20. In that case, the court determined that the plaintiffs did not have knowledge of the injury and the government causation on the date of the injury. *Id.* at 23. The court therefore extended the claim accrual date more than 14 years past the date of injury to a date in which the court believed the

plaintiffs should have known of the FBI's involvement.[7]

3. The Fifth Circuit Court of Appeals

The Fifth Circuit has similarly held that an FTCA claim accrues upon knowledge of the "existence of the injury and causation, that is, the connection between the injury and the defendant's actions." *Ramming, supra,* 281 F.3d at 162-63. As to causation, the court found that the claim does not begin to accrue until the claimant has "knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection...or (b) to seek professional advice, and then, with that advice, to conclude that there was a causal connection between the [government's] acts and the [plaintiff's] injury." *Id.* (*citing Piotrowski v. City of Houston,* 51 F.3d 512, 516 (5th Cir. 1995)).

Under this claim accrual test, Plaintiff's cause of action did not accrue until she had knowledge of facts that would lead a reasonable person to conclude that there was a causal connection between the government's acts—air traffic control—and the death of her husband. The Sixth Circuit's holding that her claim accrued on the date of the crash, rather than on the date when she learned (or for the first time could have possibly learned) that air traffic control's actions may have caused the crash, conflicts with this test.

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[7] The court ultimately held the plaintiff's claim was nonetheless barred because despite application of the discovery rule, the claim was still not timely filed.

4. The Eighth Circuit Court of Appeals

The Eighth Circuit is in line with the FTCA claim accrual analysis of the First, Fifth, and Seventh Circuits in non-medical malpractice cases. In *Garza*, *supra*, a federal prisoner, having escaped from a halfway house, killed his wife. 284 F.3d at 933. The wife's estate brought a wrongful death action under the FTCA against the United States Prison Bureau alleging that federal employees had failed to adequately supervise the prisoner and failed to advise authorities and the decedent of the prisoner's escape. *Id.* at 934. The Court of Appeals held that the FTCA claim accrued for limitations purposes when it was apparent that there was a relationship between the halfway house and federal authorities that would require further inquiry.

In support of its holding, the *Garza* court found that although a FTCA claim generally accrues when the plaintiff is injured, sometimes it does not accrue until the plaintiff knows of both an injury's existence and its cause. *Id.* at 934. The court further found that this discovery rule does not apply only to medical malpractice cases. Rather, it applies in situations where a plaintiff is blamelessly unaware of his claim because the facts establishing a causal link between the injury and the tortious activity are in control of the tortfeasor or are otherwise not evident. *Id.* "Therefore, where the government has shown that a suit was untimely in that the claim was presented more than two years from the date of injury, the plaintiff may show that he had no reason to believe he had been injured by an act or omission by the government." *Id.* The court continued, "when there are two causes of an injury, and only one is the government, the knowledge

that is required to set the statute of limitations running is knowledge of government cause, not just the other cause." *Id.* (*citing Drazen,* 762 F.2d at 59-60).

Although that court found that the claim accrual date was later than the date on which the decedent was murdered, it ultimately held that the estate's claim was nevertheless time-barred. This was because the court found that sufficient details were presented to give notice of the Bureau's involvement and to require inquiry as to their legal significance more than two years before the claim was filed (but significantly this date was after the date of the decedent's death). 284 F.3d at 937. Here, Plaintiff's claim accrued not on the date of the plane crash, but on the date at which Plaintiff had sufficient details to be on notice of the FAA's involvement, *i.e.,* June 25, 2004, and the Administrative Claim was filed within two years of that date.[8]

B. The Sixth Circuit's New Rule is Unsupported by any Precedent and Ignores the Issue of Knowledge of Government Cause.

The Sixth Circuit's holding is based on its newly announced rule that "a claim accrues when a plaintiff

[8] Indeed, it cannot be disputed that plaintiff was diligent in discovering potential government culpability in the death of her husband. On June 25, 2004, less than one month after the crash, Plaintiff, on her own initiative, contacted the NTSB Investigator-in-Charge to learn of any facts surrounding her husband's death. Prior to that date, Plaintiff was in a state of shock, did not discuss the facts of the accident with anyone, and was not contacted by the NTSB. (Affidavit of Susan Hertz, ¶¶ 5-9; Apx. 34a-35a.)

possesses enough information with respect to her injury that, '[had] [she] sought out independent legal and [expert] advice at that point, [she] should have been able to determine in the two-year period whether to file an administrative claim.'" (Apx. 4a-6a.) The court found that a claim arising from a plane crash accrues on the date of the crash as long as the record reveals that the plaintiff should have been able to determine in the subsequent two year period whether to file an administrative claim. Under the court's analysis, Plaintiff's claim accrued on the date of the crash because she had 22 months after she discovered the potential cause attributable to the government—which, the court implied, was enough time to determine whether to file a claim. (Apx. 6a.)

The Sixth Circuit cited *McIntyre, supra,* and *Kronisch v. United States,* 150 F.3d. 112, 121 (2nd Cir. 1998), in support of the above stated rule. Neither of these cases, however, support such an unprecedented holding. The quoted language from *McIntyre* is from the portion of *McIntyre* that discusses *Skwira.* In *Skwira,* the court found that the two year limitations period began when a reasonable person would believe that there was a causal connection between the injury and the acts or omission of a government employee. *Skwira,* 344 F.3d. at 80. Both *Skwira* and *McIntyre* based their claim accrual decision on objective knowledge of a causal connection between the government and the injury. The Sixth Circuit, on the other hand, did not discuss how Plaintiff's knowledge or ignorance of air traffic control conduct affected claim accrual, or why the claim accrual date would be retroactively fixed, based on later events, *i.e.,* Plaintiff's discovery of the government's potential involvement in the death of her husband. As stated

earlier, the Sixth Circuit's decision is nonsensical in that it looks at when the plaintiff had knowledge or should have had knowledge of a governmental cause. In so doing, the Sixth Circuit appears to be applying the discovery rule, only to then hold that this means there is no discovery rule, and if you discovered the governmental cause any time within two years after the crash, your claim accrued back when the crash occurred. Clearly, this is not what the discovery rule required and such a holding is inconsistent with this Court's, as well as other Circuit's, application of the discovery rule.

In *Kronisch,* the Second Circuit Court of Appeals held that the plaintiff's FTCA claim was untimely because he was aware of the basic facts of his FTCA claim more than two years before he filed his claim. 150 F.3d. at 121. The Sixth Circuit relied on *Kronisch's* finding that "a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice." (Apx. 5a.) The court in *Kronisch*, like most courts, determined an accrual date based on what plaintiff should have known at different points in time. Once an accrual date is determined, the plaintiff's subsequent knowledge is irrelevant. Indeed, under the Sixth Circuit's analysis, if Plaintiff did not know, and could not have known, about air traffic control's conduct until more than two years after the crash, its holding likely would have been different. Here, however, the Sixth Circuit determined an accrual date based on subsequent knowledge. This approach to claim accrual is clearly inconsistent with *Kronisch, McIntyre* and the other cases interpreting *Kubrick.*

Although the Sixth Circuit implicitly conceded that June 25, 2004—the date Plaintiff spoke with the NTSB investigator—was the first day she knew or should have known that the government may have caused the crash, it ignored the rule set forth in *McIntyre*, *Rakes*, *Skwira*, *Garza*, *Ramming*, and *Drazen* that a claim does not accrue until the claimant knows or should have known of facts relating to government causation, and failed to set June 25, 2004, as the claim accrual date. The court sidestepped this critical analysis by stating that Plaintiff had plenty of time (22 months) to file her claim.[9] Yet, the Sixth Circuit should not have affirmed the district court unless it found that the government cause (air traffic control) was known, or should have been known, by plaintiff on or before June 8, 2004, two years and one day before the Administrative Claim was filed. It made no such finding because such a finding was not supported by the record.

By ignoring the issue of knowledge of government causation, or, more accurately, misapplying it, the Sixth Circuit established a claim accrual rule for FTCA cases that conflicts with the First, Fifth, Seventh, and Eighth Circuits.[10] That rule, if not

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[9] The Sixth Circuit's reference to 22 months is yet another example of its error in determining claim accrual in this case and why its unprecedented rule is inconsistent with §2401(b). The rule allows a claimant 24 months. A claim accrual rule that focuses on any period of time less than 24 months is improper and inconsistent with *Kubrick* and the Courts of Appeal cases discussed herein.

[10] The Ninth Circuit Court of Appeals held in a plane crash case that the plaintiff's claim accrued when she knew of her injury (the

reversed, will result in irreparable harm and substantial prejudice to Plaintiff. Moreover, such a precedent will encourage the filing of Administrative Claims after all plane crash cases in the Sixth Circuit. Counsel for injured families will file claims purely as a preventive measure in case it should be discovered within the next two years that a governmental agency may have been the cause of the crash, thus retroactively causing the FTCA claim to begin to accrue on the date of the crash.

In an apparent attempt to evade the question of knowledge of government cause, the Sixth Circuit stated that "plane crashes by their nature typically involve negligence somewhere in the causal chain; and the mere fact of this event is thus typically enough to put the plaintiff on inquiry notice of his claim." (Apx 5a.) First, this statement is simply not true. Events such as bird or lightening strikes, or pilot illness, may cause a crash without there being any negligence by anyone involved. Also, in the case of a single aircraft accident as in the case at bar, governmental involvement in the cause is not common. Second, even if this were true, it is irrelevant to the issue of claim accrual. An FTCA claim accrues only when a plaintiff is armed with sufficient facts to permit a reasonable person to believe that there is a causal connection

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death of her mother) and its immediate physical cause (the plane crash). *Green v. United States*, 172 F3d 56 (9th Cir. 1998) (unpublished table decision). Although the Ninth Circuit's ruling (which was not relied upon below) is consistent with the Sixth Circuit opinion at issue, it provides little guidance as it does not discuss the discovery rule in any depth or discuss the reasons for its holding. If nothing else, *Green* shows there to be a circuit split that further warrants this Court's review.

between the *government* and their injury, not just that someone at some point may have been negligent.

> [I]n the medical malpractice context, where there is often a direct relationship between the patient and doctor, one need not know of a governmental causal connection for a claim to accrue under the FTCA. Outside the medical malpractice context, however, the identity of the individual(s) responsible for an injury may be less evident, and a plaintiff may have less reason to suspect governmental involvement. Not surprisingly, courts of appeals have been slightly more forgiving in these cases, deferring the accrual of claims until a reasonably diligent plaintiff has reason to suspect a governmental connection with the injury.

Skwira, 344 F.3d at 77. The Sixth Circuit's reasoning for distinguishing plane crashes from other events is flawed. If anything, plane crashes present a more compelling case for application of the discovery rule because (1) the relevant facts are within the exclusive province of the NTSB and individual investigations are not allowed, and (2) air traffic control negligence involving the crash of a single general aviation aircraft is uncommon, and therefore, an unanticipated event.

Under *Kubrick* and its progeny as annunciated by the First, Fifth, Seventh, and Eighth Circuits, to determine the point of accrual, the Sixth Circuit and trial court were required to evaluate when a reasonable person received sufficient information to place him or her on notice that the government was responsible for the crash. Before June 25, 2004, a reasonable person in Plaintiff's position would not

have uncovered a sufficient basis to believe that the FAA was the cause of the crash because the NTSB had exclusive access to the necessary information. *See McIntyre*, 367 F.3d at 54; *see also* 49 C.F.R. § 831.2(a)(1)(2008). It was not until June 25, 2004, at the earliest, that Plaintiff (through her own initiative) could have discovered both her injury (the decedent's death) and the government-related cause (air traffic control). Under these circumstances, just knowing that Plaintiff's decedent died in an airplane crash should not have started the statute of limitations running for purposes of claim accrual under the FTCA. The clock did not begin to run until Plaintiff knew or should have known that the actions or inactions of government personnel caused the crash. *See Skwira*, 344 F.3d at 82; *Rakes*, 442 F.3d at 11; *McIntyre*, 367 F.3d at 52; *Garza*, 284 F.3d at 934; *Ramming*, 281 F.3d at 162-63. This occurred on June 25, 2004, and the Administrative Claim was timely filed before June 25, 2006, two years after the claim accrued. Therefore, the Sixth Circuit erred and review by this Court is necessary.

CONCLUSION

The Sixth Circuit Court of Appeals created a new rule of law that an FTCA claim arising from a plane crash accrues on the date of the crash if the claimant should have been able to determine anytime within the following two years that he or she had a claim against a governmental entity. The Sixth Circuit's holding and rule is inconsistent with this Court's holding in *Kubrick* and the First, Fifth, Seventh, and Eighth Circuits application of *Kubrick's* "discovery rule" regarding claim accrual.

Petitioner respectfully requests that this Court grant the writ of certiorari, review this case, and upon review, reverse the Sixth Circuit Court of Appeals' decision.

Respectfully submitted,

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June 29, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-1724

[Filed March 31, 2009]

SUSAN HERTZ, Individually and as Personal Representative of the ESTATE OF ROGER HERTZ, Deceased,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan at Ann Arbor.
No. 06-15443—John Corbett O'Meara, District Judge.

Argued: January 22, 2009

Decided and Filed: March 31, 2009

Before: SURHEINRICH, GRIFFIN, and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Jill M. Wheaton, DYKEMA GOSSETT, Ann Arbor, Michigan, for Appellant. Colleen Love Conlin, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Daniel J. Stephenson, David M. George, DYKEMA GOSSETT, Ann Arbor, Michigan, Kathryn J. Humphrey, DYKEMA GOSSETT, Detroit, Michigan, for Appellant. Colleen Love Conlin, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. Deborah A. Hebert, Michael J. Sullivan, COLLINS, EINHORN, FARRELL & ULANOFF, Southfield, Michigan, for Amici Curiae.

OPINION

KETHLEDGE, Circuit Judge. Plaintiff Susan Hertz appeals the district court's dismissal, on limitations grounds, of her claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq*. We affirm.

I.

Roger Hertz, a passenger on board an amateur-built experimental airplane, was killed on May 31, 2004, when the plane flew into a thunderstorm and crashed. The National Transportation Safety Board ("NTSB") investigated the crash. On June 25, 2004, Hertz's widow, Plaintiff Susan Hertz, telephoned the NTSB's Investigator-in-Charge, who told her that "the NTSB believed that the cause of the accident was related to air traffic controller negligence." The Federal Aviation Administration ("FAA") apparently had been responsible for the plane's air-traffic control.

Plaintiff promptly retained counsel to pursue claims against any entities responsible for her husband's death, "including the United States." The estates of two other passengers indeed filed claims against the United States within the two-year period prescribed by 28 U.S.C. § 2401(b). Plaintiff's then-counsel, however, did not file a claim with the FAA until June 9, 2006, which was more than two years after the crash. The FAA denied her claim as untimely.

Plaintiff thereafter commenced this lawsuit in the United States District Court for the Eastern District of Michigan. The United States moved to dismiss the claim as time-barred under § 2401(b). The district court granted the motion, and this appeal followed.

II.

We review *de novo* a district court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(1), *see Abbott v. Michigan*, 474 F.3d 324, 328 (6th Cir. 2007), as well as a district court's interpretation of the FTCA's statute of limitations. *See Tolbert v. State of Ohio Dep't of Trans.*, 172 F.3d 934, 938 (6th Cir. 1999).

Title 28 U.S.C. § 2401(b) provides, in relevant part, that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues[.]" Under this section, the "general rule" is that "a tort claim accrues at the time of the plaintiff's injury[.]" *U.S. v. Kubrick*, 444 U.S. 111, 120 (1979); *see also, e.g., Kronisch v. U.S.*, 150 F.3d 112, 121 (2d Cir. 1998) ("Ordinarily, a plaintiff's FTCA claim accrues at the time of injury"). Application of

that rule would bar Plaintiff's claim. The question presented in this case, therefore, is whether the record permits making an exception to the rule.

Kubrick is the leading precedent concerning accrual of claims for purposes of § 2401(b). There; Kubrick asserted a medical-malpractice claim based upon treatment he had received in a Veterans Administration ("VA") hospital. His injury, which was hearing loss, occurred in 1968; in January 1969, he learned that the hearing loss may have been caused by an antibiotic, neomycin, given to him by the VA; and in June 1971, he learned that the neomycin "should not have been administered" to him at all. *Id.* at 114. Kubrick argued that his claim accrued on the latter date, since that was the date on which he first discovered that VA negligence may have played a role in his injury. But the Supreme Court disagreed. The Court reasoned that "'accrual' of a claim" does not "await awareness by the plaintiff that his injury was negligently inflicted." *Id.* at 123. Instead, the Court held, a claim accrues when a plaintiff, "armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community." *Id.* Under that test, Kubrick's claim accrued in January 1969—when he learned that neomycin caused his injury—because at that time he "need only have made inquiry among doctors with average training and experience in such matters to have discovered that he probably had a good cause of action." *Id.*

Kubrick thus applied not a discovery rule (in the sense of discovering the existence of a claim) with respect to the accrual of claims under the FTCA, but an inquiry-notice rule. Specifically, a claim accrues

when a plaintiff possesses enough information with respect to her injury that, "[h]ad [she] sought out independent legal and [expert] advice at that point, [she] should have been able to determine in the two-year period whether to file an administrative claim." *McIntyre v. U.S.*, 367 F.3d 38, 53 (1st Cir. 2004); *see also Kronisch*, 150 F.3d at 121 ("a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice") (internal quotation marks omitted).

The determination as to *when* a plaintiff has such knowledge is necessarily fact-intensive. In some cases, particularly medical-malpractice cases in which the plaintiff has little reason to suspect anything other than natural causes for his injury, a plaintiff might need to know, or have reason to know, of doctor-caused harm (though not necessarily of *negligently* doctor-caused harm) in order for his claim to accrue. *See e.g.*, *Drazan v. U.S.*, 762 F.2d 56, 59 (7th Cir. 1985) (plaintiff's mere knowledge that her spouse died of cancer did not trigger accrual of claim for VA malpractice); *Diaz v. U.S.*, 165 F.3d 1337, 1341 (11th Cir. 1999) (plaintiff's knowledge of spouse's suicide, "without any indication of medical treatment beforehand," did not trigger accrual of malpractice claim).

But deaths by plane crashes are different, for purposes of this rule, than deaths by cancer. Plane crashes by their nature typically involve negligence *somewhere* in the causal chain; and the mere fact of the event is thus typically enough to put the plaintiff on inquiry notice of his claim. If the record further reveals that the plaintiff "should have been able to

determine in the two-year period whether to file an administrative claim[,]" *McIntyre*, 367 F.3d at 53, then there is no reason to depart from the general rule that accrual occurs upon injury.

Such is the case here. Plaintiff's spouse died, tragically, in a plane crash. The record makes plain—and Plaintiff herself concedes—not only that she should have been able to determine in the two-year period whether to file a claim, but that she in fact *made* that determination, when the NTSB investigator told her, less than a month after the crash, that "the NTSB believed that the cause of the accident was related to air traffic controller negligence." The problem was simply that, for whatever reason, her then-counsel chose not to file the claim in the remaining 22 months of the period prescribed by Congress.

We lack authority to overlook that omission. "Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117. Anything other than affirmance would frustrate that purpose here. And so too would granting Plaintiff's request that we apply equitable tolling to her claim. *See generally Chomic v. U.S.*, 377 F.3d 607, 615-16 (6th Cir. 2004) (refusing to apply equitable tolling where "the record is clear that Chomic had seventeen months as Personal Representative in which she could have investigated and filed a timely claim").

The District Court's April 6, 2007 Opinion and Order are affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-15443

[Filed April 6, 2007]

SUSAN HERTZ, Individually and as Personal Representative of the ESTATE OF ROGER B. HERTZ, Deceased,	)
Plaintiff,	)
v.	)
UNITED STATES OF AMERICA,	)
Defendant.	)

Honorable John Corbett O'Meara

OPINION AND ORDER GRANTING DEFENDANT'S FEBRUARY 7, 2007 MOTION TO DISMISS

This matter came before the court on defendant United States of America's February 2, 2007 motion to dismiss. Plaintiff Susan Hertz filed a response March

23, 2007; and the government filed a reply April 3, 2007. Oral argument was heard April 5, 2007.

BACKGROUND FACTS

Roger B. Hertz, Plaintiff's decedent, was killed in the crash of an experimental airplane on May 31, 2004, near Vermontville, Michigan. Although Plaintiff knew of both her husband's death and the cause of death at that time, it was not until she met with officials of the Federal Aviation Administration ("FAA") on June 25, 2004, that she first became aware of "certain facts that implicated potential culpability on the part of the FAA." Plaintiff's br. at 7.

On June 9, 2006, Plaintiff's counsel sent an administrative claim to the Federal Aviation Administration ("FAA"), seeking money damages for his wrongful death. The claim was denied as untimely.

The sole issue before the court is whether Plaintiff's claim was timely filed under the two-year statute of limitations in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2401(b). If Plaintiff's wrongful death claim accrued on the date of the plane crash in which her husband was killed, then her administrative claim, filed more than two years later, is barred by the statute of limitations. If, however, as Plaintiff argues, by operation of the "discovery rule," the cause of action accrued when she first became aware of the potential culpability on the part of the FAA, her claim was timely filed. In the alternative, Plaintiff argues that the equitable tolling doctrine applies to prevent the running of the statute of limitations.

LAW AND ANALYSIS

The statute of limitations for the FTCA mandates that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b).

Plaintiff relies on the discovery rule enunciated by the United States Supreme Court in Kubrick v. United States, 441 U.S. 111 (1979). However, Plaintiff's argument, that her claim did not accrue until she became aware of the FAA's potential culpability, was explicitly rejected by the Court. "We thus cannot hold that Congress intended that 'accrual' of a claim must await awareness by the plaintiff that his injury was negligently inflicted." Id. at 123. Instead, the Court held, "[a] claim accrues within the meaning of § 2401(b) when Plaintiff knows both the existence and the cause of his injury, and not at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice [negligence]." Id. at 111. The Court reasoned that a plaintiff such as Hertz, who knows the fact of her injury, as well as its cause, can protect herself by seeking advice in the legal community. Id.

In this case plaintiff Hertz had ample opportunity, 22 months, in which to file her claim even *after* she spoke with FAA officials in June 2004. The United States Court of Appeals for the Sixth Circuit recently commented under similar circumstances that 17 months constituted ample opportunity for a plaintiff to file a claim. Chomic v. United States, 377 F.3d 607 (6th Cir. 2004).

Plaintiff's alternative theory is that equitable tolling should stop the running of the statute of limitations period because the government itself had all of the evidence regarding the plane crash; therefore, the government controlled when she could have found out about the potential culpability of the FAA. In this case, however, Plaintiff has not alleged any misconduct, fraud, or concealment of material facts by the FAA to induce Plaintiff into letting the statute of limitations expire before knowing the fact of her injury as well as its cause. Although this circuit has acknowledged that equitable tolling may be applied in suits against the government, it may be used only "'sparingly,' and not where there has been only 'a garden variety claim of excusable neglect.'" Chomic, 377 F.3d at 615.

The record in this case indicates that Plaintiff had more than 22 months after retaining counsel to investigate and file a timely claim. Lack of diligence defeats her argument for equitable tolling.

ORDER

It is hereby **ORDERED** that the government's February 7, 2007 motion to dismiss is **GRANTED.**

s/John Corbett O'Meara
United States District Judge

Dated: April 6, 2007

* * *

[Certificate of Service omitted
in printing of this appendix]

APPENDIX C

United States Code

Title 28. Judiciary and Judicial Procedure
Part VI. Particular Proceedings
Chapter 161. United States as Party Generally

28 U.S.C. § 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 971; Apr. 25, 1949, c. 92, § 1, 63 Stat. 62; Sept. 8, 1959, Pub.L. 86-238, § 1(3), 73 Stat. 472; July 18, 1966, Pub.L. 89-506, § 7, 80 Stat.

307; Nov. 1, 1978, Pub.L. 95-563, § 14(b), 92 Stat. 2389.)

Current through P.L. 111-25 (excluding P.L. 111-22) approved 6-2-09

APPENDIX D

National Transportation Safety Board
FACTUAL REPORT AVIATION

NTSB ID: CHI04LA129	Aircraft Registration Number: N707SH
Occurrence Date: 5/31/2004	Most Critical Injury: Fatal
Occurrence Type: Accident	Investigated By: NTSB

Location/Time

Nearest City/Place	State	Zip Code	Local Time	Time Zone
Vermontville	MI	49096	1400	EDT

Airport Proximity: Off Airport/Airstrip
Distance From Landing Facility:
Direction From Airport:

Aircraft Information Summary

Aircraft Manufacturer	Model/Series	Type of Aircraft
Hall	Lancair IV-P	Airplane

Sightseeing Flight: No

Air Medical Transport Flight: No

Narrative

Brief narrative statement of facts, conditions and circumstances pertinent to the accident/incident:

HISTORY OF FLIGHT

On May 31, 2004, at 1400 eastern daylight time, an amateur-built Hall Lancair IV-P, N707SH, piloted by a private pilot, was destroyed during an in-flight collision with terrain following a loss of control during cruise flight near Vermontville, Michigan. Instrument meteorological conditions (IMC) with thunderstorms were present at the time of the accident. The business flight was operating under the provisions of 14 Code of Federal Regulations (CFR) Part 91 on an instrument flight rules (IFR) flight plan. The pilot and two passengers were fatally injured. The flight departed Willow Run Airport (YIP), Ypsilanti, Michigan, at 1330, and was en route to Billings Logan International Airport (BIL), Billings, Montana.

At 1213, the pilot of N707SH contacted Lansing (LAN) Automated Flight Service Station requesting a weather briefing for a flight from YIP, to Portland International Airport (PDX), Portland, Oregon, with an en route stop to be determined. The briefer advised the pilot to expect thunderstorm and rain shower activity in Michigan, moderate turbulence below 9,000 feet msl, and icing conditions between 7,000 and 14,000 feet msl. The briefer also described an area of thunderstorms extending from south of Milwaukee (MKE) through the Chicago metropolitan area and extending almost to the Iowa border. The briefer did

not specify the source of the thunderstorm information, although it coincided with the area covered by SIGMET 43C (valid from 1155 to 1355). This SIGMET reported a developing area of thunderstorms moving from the west at 30 knots, with tops reaching 28,000 feet msl. The briefer advised the pilot to contact Flight Watch or flight service after departure for assistance in avoiding this adverse weather. The briefer then continued to provide weather information from the eastern Michigan area toward PDX and BIL, as well as winds aloft for the pilot's requested cruise altitude of 10,000 feet msl.

When asked where he planned to stop en route to PDX, the pilot replied, "Why don't we plan on Billings." The briefer advised that there were numerous notices to airmen in effect for BIL airport and its associated approach procedures. The pilot then filed an IFR flight plan from YIP to BIL via MKE, requesting a 10,000 feet msl cruise altitude.

N707SH departed YIP at 1330 en route to BIL. The cleared route of flight was YIP direct EARVN intersection, direct MKE, direct to BIL, cruising at 10,000 feet msl. The aircraft was initially in contact with Detroit departure control, and was subsequently handled by LAN approach control, Cleveland Air Route Traffic Control Center (ZOB), and finally Chicago Air Route Traffic Control Center (ZAU).

The pilot contacted LAN approach at 1341 while climbing to 10,000 feet msl. At 1344, the LAN approach controller asked if the aircraft was equipped with weather radar. The pilot responded that it was not, and the controller advised the pilot of weather

ahead that might affect the aircraft's flight. The pilot requested vectors around the weather.

At 1345, the LAN controller asked Grand Rapids approach control (GRR) to see if they could provide further information on the extent and intensity of the precipitation. GRR approach control was equipped with an ASR-9 radar antenna that depicted six-level weather information in addition to its basic air traffic control display capabilities. LAN approach control was equipped with an ASR-7 radar antenna that had limited weather capabilities. The GRR controller was unable to assist at that moment due to workload, but said that he would call back. The LAN controller then issued N707SH a 270-degree heading to avoid the weather depicted on the controllers display.

During this period, the aircraft climbed above its assigned altitude of 10,000 feet msl twice, at one instance reaching 10,800 feet msl. At 1349, the pilot requested to climb to 11,000 feet msl because it was "pretty bumpy" in the clouds. The LAN controller told the pilot to expect 12,000 feet msl, but to remain at 10,000 feet msl pending coordination with ZOB.

At 1350, the LAN controller completed an automated handoff to the ZOB Jackson sector. The LAN controller advised the ZOB Jackson controller that N707SH was on a 270-degree heading to avoid weather, and relayed the pilot's request for 12,000 feet msl. At 1351, the ZOB Jackson controller cleared N707SH to climb to 12,000 feet msl and instructed the pilot to proceed direct MKE when able, but did not provide any information about radar-observed weather ahead of the aircraft.

Aircraft radar track data was obtained from the GRR approach control facility. The plotted data showed the accident aircraft turned from the previously assigned 270-degree heading about 20-30 degrees right to a direct course toward MKE.

At 1351:41, the ZOB Jackson sector controller advised the ZAU Sparta sector controller that N707SH was proceeding direct to MKE and had not requested any weather deviations. The ZOB Jackson controller also told the ZAU Sparta controller that ZAU Sparta sector had control for any weather deviations and that the pilot had been having trouble holding altitude while at 10,000 feet msl. At 1354:06, the ZAU Sparta controller checked to see if N707SH was on frequency and asked the pilot to verify his altitude. The pilot stated that he was at 11,900 feet msl. At 1354:55 the ZAU Sparta controller told the pilot to report reaching 12,000 feet msl, which the pilot complied with at 1355:02.

At 1358:34, the pilot of N707SH transmitted, "Center this is uh 707SH what do you show us in up here?" The ZAU Sparta controller twice asked the pilot to repeat his message, with no immediate response. Aircraft radar track data was plotted on a weather radar chart that depicted areas of precipitation and their corresponding intensities. The plotted data showed the accident airplane flying into an area of level six precipitation at 12,000 feet msl, prior to a rapid loss of altitude. Level six precipitation returns are characterized as "Extreme" by the National Weather Service and are the highest intensity classification.

At 1359:09, the pilot transmitted, "707SH SOS I've got something wrong with the flight controls." At 1359:16, the ZAU Sparta controller responded, "707SH go

ahead let me know what you need." At 1359:19, the sound of an open microphone was heard on the frequency for 12 seconds. At 1359:40, the pilot said, "Chicago center 707SH we are (going in I) can't maintain altitude. At 1359:53, the ZAU Sparta controller responded, "707SH roger there's no aircraft between you and the airport (unintelligible) for Grand Rapids. Grand Rapids is approximately twelve o'clock about 15 miles." There were no further contacts with N707SH.

At 1400:04, the ZAU Sparta radar associate controller contacted GRR approach to coordinate emergency information on N707SH. He informed GRR that the aircraft had been at 12,000 feet msl but appeared to have departed that altitude. At 1400:47, the ZAU Sparta radar associate told GRR, "... twenty to twenty five southwest of LAN looks like we've gone to a primary only it looks like he's right in the middle of that cell." The GRR controller was unable to assist ZAU Sparta sector in locating N707SH, but at 1402:02 he did report that he could see a weather cell at the location provided by ZAU Sparta sector for the aircraft.

The ZAU Sparta controllers contacted LAN approach, ZOB, and GRR approach and asked other aircraft in the area for assistance in locating or reestablishing contact with N707SH. At 1414:54, GRR approach advised the ZAU Sparta controller that the Eaton County police were investigating a report of an aircraft accident near Vermontville, Michigan. The wreckage site was subsequently located by the police and confirmed to be the accident airplane.

Transcripts of the voice communications and plots of the aircraft radar track data are included with the docket material associated with this factual report.

Several witnesses reported first hearing the sound of a revving aircraft engine before seeing the airplane descending rapidly in a spiraling descent, according to an Eaton County Sheriff Case Report. The report indicated that a pilot-rated witness observed the airplane in a "flat spin" before impacting the terrain.

The responding Deputy Sheriff reported that, "At the time the [accident] call was going out I was approximately a mile and a half away in Vermontville. At that time it had just started raining very heavily in Vermontville. It had been scattered clouds and then started raining heavily about the time the [accident] call went out."

PERSONNEL INFORMATION

The pilot held a private pilot certificate with single-engine land and instrument airplane ratings. Federal Aviation Administration (FAA) records indicate his last airman medical examination was completed on December 6, 2002, when he was issued a third-class medical certificate with the restriction; "must have available glasses for near vision."

The pilot's current flight logbook was stored on a laptop computer, which was reportedly damaged during the accident. Another copy of the pilot's computerized logbook was located on different computer that documented his flight experience between July 5, 2000, and April 23, 2004. According to the last logbook entry, the pilot had a total flight time

of 1,073.8 hours, of which 1,000.0 hours were as pilot-in-command (PIC). The pilot had reportedly flown approximately 65 hours in the accident airplane.

A portion of the pilot's hard-bound flight logbook was provided by a representative of his estate. This logbook contained training endorsements and documented his ground and flight training in the accident airplane. The most current flight review and instrument proficiency check were completed on May 29, 2001, as required by 14 CFR Part 61.56 and 61.57(d) respectively.

On April 26, 2004, the pilot reported his most current flight review was completed on April 10, 2004, while applying for an airplane insurance policy. However, the recovered flight logbooks did not contain a specific endorsement for the reported flight review training.

On April 9-10, 2004, the pilot obtained 10.0 hours of dual flight instruction from a Lancair endorsed flight instructor. On April 9, 2004, the pilot received an endorsement for ground instruction covering Lancair IV-P systems and operations. On April 10, 2004, the pilot received an endorsement for high-altitude airplanes, as required by 14 CFR Part 61.31(g). The pilot did not receive endorsements for a flight review or instrument proficiency check from the Lancair endorsed flight instructor. Subsequent to the accident, the flight instructor provided the pilot's insurance company the following signed statement: "Having flown with [the pilot], if I had been asked at the time we flew (April 2004), I would have agreed to endorse his logbook for the biennial flight review in accordance with the Federal Aviation Regulations."

The following flight times were calculated from the pilot's computerized flight logbook:

The pilot accumulated 156.0 flight hours in the past year, 77.3 hours during the prior 6 months, 47.6 hours during the past 90 days, and no hours during the previous 30 days. The last flight logbook entry was dated April 23, 2004.

The pilot had accumulated 107.1 flight hours in actual IMC. He did not log any flight hours in actual IMC during the previous year and no instrument approaches during flights in actual IMC. The computerized logbook did not track simulated instrument time. No safety pilot or instructor information was included with the logbook entries, as required by 14 CFR Part 61.51(g) if simulated instrument time had been flown.

The pilot had accumulated 113.6 flight hours during night conditions. During the previous 90 days he logged 2.0 hours at night and no hours during the prior 30 days.

AIRCRAFT INFORMATION

The accident airplane was a Hall Lancair IV-P, serial number LIV-363. The airplane was a pressurized, low-wing airplane equipped with a retractable tricycle landing gear, electrically actuated wing flaps, and a single reciprocating engine with a constant speed propeller. The airframe was constructed of high temperature, epoxy prepreg, carbon fiber materials. The airplane was configured with two pilot stations and dual control side-sticks. The airplane

accommodated four occupants and had a builder-specified maximum takeoff weight of 3,700 lbs.

The amateur-built airplane was issued an experimental airworthiness certificate on April 1, 2001. The last annual condition inspection was completed on April 7, 2004, at 84.7 hours total time since new. The airplane had reportedly flown approximately 65 hours since the inspection. The altimeter, static system, automatic pressure altitude reporting equipment and ATC transponder were last tested/certified on March 25, 2003. All applicable service bulletins had been complied with as of the April 2004 condition inspection.

The airplane was equipped with a 350 horsepower Teledyne Continental Motors TSIO-550-EIB engine, serial number 803149. The TSIO-550-E18 model was a six-cylinder, 550 cubic inch displacement, twin turbocharged, fuel injected, horizontally opposed reciprocating engine. The engine was manufactured on November 26, 2000, and installed on the accident airplane on January 4, 2003. The engine had a total time of 24.7 hours since new as of the April 2004 condition inspection. A review of the engine maintenance records found no history of operational problems.

The propeller was a three-bladed Hartzell PHC-H3YF-1RF/F7490, hub serial number HR138B. The propeller was manufactured on October 4, 2000, and was installed on the accident airplane on March 26, 2003. The propeller had accumulated 24.7 hours since new as of the April 2004. A review of the propeller maintenance records found no history of operational problems.

A post-accident calculation of the airplane's weight and balance indicated that it was under the builder-specified maximum gross weight and within the approved center-of-gravity range.

On May 28, 2001, the airplane was substantially damaged during a forced landing following a loss of engine power while in cruise flight. The aircraft was repaired by the original builder and subsequently sold to the accident pilot on April 8, 2004.

METEOROLOGICAL INFORMATION

There was an Automated Surface Observing System (ASOS) station located at the Gerald R. Ford International Airport, about 25 nm west-northwest of the accident site. The following weather conditions were recorded before and after the time of the accident:

At 1256: Wind 240 degrees true at 25 knots, gusting to 29 knots; visibility 10 statute miles (sm); broken ceiling at 2,200 feet above ground level (agl), broken ceiling at 4,500 feet agl; temperature 21 degrees Celsius; dew point 15 degrees Celsius; altimeter setting 29.43 inches of mercury; Remarks: peak wind of 29 knots from 230 degrees true (recorded at 1256).

At 1356: Wind 250 degrees true at 24 knots, gusting to 29 knots; visibility 10 sm; broken ceiling at 2,800 feet agl (towering cumulus), broken ceiling at 8,000 feet agl, broken ceiling at 16,000 feet agl; temperature 21 degrees Celsius; dew point 13 degrees Celsius; altimeter setting 29.43 inches of mercury, Remarks: peak wind of 29 knots from 240 degrees true (recorded

at 1355), towering cumulus present northwest to north.

At 1420: Wind 240 degrees true at 24 knots, gusting to 33 knots; visibility 10 sm; scattered clouds at 3,100 feet agl, broken ceiling at 18,000 feet agl; temperature 21 degrees Celsius; dew point 12 degrees Celsius; altimeter setting 29.44 inches of mercury, Remarks: peak wind of 33 knots from 250 degrees true (recorded at 1415), cumulonimbus present distant east moving northeast.

A Meteorological Impact Statement (MIS) was issued by the Center Weather Service Unit located at the Chicago Air Route Traffic Control Center. The MIS was issued for planning air traffic control operations and coordinating aircraft traffic flow. The statement indicated scattered areas of rain showers with isolated to widely scattered thunderstorms within the ZAU control area. Thunderstorm tops were stated to be between 20,000 feet and 25,000 feet msl.

An AIRMET for turbulence was issued at 1105 and was valid until 1600. The AIRMET forecasted occasional moderate turbulence below 9,000 feet msl due to moderate northwesterly to westerly winds.

Convective SIGMET 47C was valid at the time of the accident and noted a developing area of thunderstorms moving from 260 degrees true at 35 knots, with tops up to 29,000 feet msl.

Convective SIGMET 45C was valid at the time of the accident and noted a line of thunderstorms 30 nm wide moving from 270 degrees true at 30 knots, with tops up to 28,000 feet msl.

WRECKAGE AND IMPACT INFORMATION

Federal Aviation Administration (FAA) inspectors performed the on-scene inspection of the wreckage.

A global positioning system (GSP) receiver recorded the position of the main wreckage as 42-degrees 37.793-minutes north latitude, 85-degrees 03.632-minutes west longitude. The main wreckage was found in a wooded area located about 1.5 nm west of Vermontville, Michigan.

The main wreckage consisted of the fuselage, wings, empennage, engine, and propeller. There was no evidence of lateral wreckage propagation. There were several tree branches surrounding the main wreckage, consistent with the airplane traveling vertically through trees prior to impact. The leading edges of both wings were not deformed or crushed in the aft direction. There was no evidence of either wing being displaced in the aft direction. The elevator counterbalance weights were found separated and embedded in the terrain directly below their respective elevators. The lower fuselage was crushed upward, uniformly along its length. The engine and propeller were partially buried in the terrain. The distribution of the wreckage was consistent with a slightly nose-low, wings level, vertical impact.

Aircraft debris was distributed around the main wreckage up to 50 feet. All primary airframe structural components, flight control surfaces, powerplant components, and propeller blades were present. Aileron flight control continuity was confirmed from the control surfaces to the cockpit side-sticks. Elevator and rudder flight control

continuity could not be established due to damage. Inspection of the recovered flight control components did not exhibit any evidence of pre-impact malfunction. The wing flaps and speed brakes were found retracted. Damage to the nose and main landing gear was consistent an extended landing gear position at the time of impact.

The engine remained attached to its engine mounts and the firewall. The propeller remained attached to the engine propeller flange. All three propeller blades remained attached to the hub assembly. One blade had leading edge damage, chordwise scratching, burnishing of the blade backs, and spanwise S-shape bends. The other two blades were bent spanwise opposite the direction of rotation.

MEDICAL AND PATHOLOGICAL INFORMATION

An autopsy was performed on the pilot and two passengers on June 1, 2004, at the Sparrow Regional Laboratories, Lansing, Michigan.

Toxicology samples for the pilot were submitted to the FAA Civil Aeromedical Institute, Oklahoma City, Oklahoma, and negative results were reported for all tests performed.

TESTS AND RESEARCH

FAA handbook 7110.65, "Air Traffic Control", paragraph 2-6-4, "Weather and Chaff Services", states in part:

* Issue pertinent information on observed/reported weather or chaff areas. Provide radar navigation

guidance and/or approve deviations around weather or chaff areas when requested by the pilot.

* Issue weather and chaff information by defining the area of coverage in terms of aziumuth (by referring the 12-hour clock) and distance from the aircraft or by indicating the general width of the area of coverage in terms of fixes or distance and direction from fixes.

* Issue the level of echo intensity when that information is available

* When a deviation cannot be approved as requested and the situation permits, suggest an alternative course of action.

* In areas of significant weather, plan ahead and be prepared to suggest, upon pilot request, the use of alternative routes/altitudes.

* Weather significant to the safety of aircraft includes such conditions as tornadoes, lines of thunderstorms, embedded thunderstorms, large hail, wind shear, microbursts, moderate to extreme turbulence (including clear air turbulence), and light to severe icing.

During an interview of the ZOB Jackson controller, the controller was asked what he meant by telling the pilot to proceed direct Milwaukee when able. The ZOB controller responded that he believed it was better to allow the pilot go on course and give the ZAU center control for possible deviations around any weather that they were showing on their displays. The ZOB controller confirmed that he saw weather about 8-10 minutes ahead of the accident airplane and

acknowledged that the LAN controller had placed the airplane on the 270 degree heading to avoid weather. The ZOB controller stated he generally allows pilots to make any weather deviations based on the weather information that he relays. When asked to clarify why he believed the pilot could deviate around weather on his own after the LAN controller initiated the 270 degree heading to avoid weather, he responded that he was allowing the pilot to make his own decisions regarding weather.

Weather intensity and its NWS category is depicted on ARTCC controller displays by shade and type of shading: medium blue (level 2, light to moderate), crosshatched blue and cyan (level 3-4, strong), and solid cyan (level 5-6, intense to extreme).

During a post-accident interview, the ZAU controller stated that there were three levels of weather depicted on a scope: "light green" represented rain, "dark green" represented heavier rain, and a "checkerboard pattern" indicated the heaviest precipitation. The ZAU controller further stated that "light green" areas are level 1 weather or less, "dark green" represents levels 2 and 3, and the "checkerboard pattern" indicates level 3 or above.

ADDITIONAL DATA/INFORMATION

Parties to the investigation included the FAA, National Air Traffic Controllers Association (NATCA), and Lancair International Inc.

Factual Report Aviation - Cont.

[*See fold-out, next 3 pages*]

National Transportation Safety Board

FACTUAL REPORT AVIATION

NTSB ID: CHI04LA129
Occurrence Date: 5/31/2004
Occurrence Type: Accident

Landing Facility/Approach Information

Airport Name	Airport ID	Airport Elevation	Runway Used	Runway Length	Runway Width
		Ft. MSL	NA		

Runway Surface Type:

Runway Surface Condition:

Type Instrument Approach: NONE

VFR Approach/Landing: None

Aircraft Information

Aircraft Manufacturer	Model/Series	Serial Number
Hall	Lancair IV-P	LIV-363

Airworthiness Certificate(s): Experimental (Special)

Landing Gear Type: Retractable - Tricycle

Homebuilt Aircraft? Yes	Number of Seats: 4	Certified Max Gross Wt. 3700 LBS	Number of Engines: 1

Engine Type:	Engine Manufacturer:	Model/Series:	Rated Power:
Reciprocating	Teledyne Continental	TSIO-550-E1B	350 HP

- Aircraft Inspection Information

Type of Last Inspection	Date of Last Inspection	Time Since Last Inspection	Airframe Total Time
Annual	4/7/2004	65 Hours	150 Hours

- Emergency Locator Transmitter (ELT) Information

ELT Installed? Yes	ELT Operated? No	ELT Aided in Locating Accident Site? No

Owner/Operator Information

Registered Aircraft Owner	Street Address		
Ward Synthesis, Inc.	3401 Berry Road		
	City: Ypsilanti	State: MI	Zip Code: 48198

Operator of Aircraft	Street Address		
Same As Reg'd Aircraft Owner	Same as Registered Aircraft Owner		
	City	State	Zip Code

Operator Does Business As: | Operator Designator Code:

- Type of U.S. Certificate(s) Held: None

Air Carrier Operating Certificate(s):

Operating Certificate: | Operator Certificate:

Regulation Flight Conducted Under: Part 91: General Aviation

Type of Flight Operation Conducted: Business

National Transportation Safety Board

FACTUAL REPORT AVIATION

NTSB ID:	CHI04LA129
Occurrence Date:	5/31/2004
Occurrence Type:	Accident

First Pilot Information

Name	City	State	Date of Birth	Age
Allen C Ward	Ypsilanti	MI	On File	52

Sex: M	Seat Occupied: Left	Principal Profession: Unknown	Certificate Number: On File

Certificate(s): Private

Airplane Rating(s): Single-engine Land

Rotorcraft/Glider/LTA: None

Instrument Rating(s): Airplane

Instructor Rating(s): None

Type Rating/Endorsement for Accident/Incident Aircraft? No	Current Biennial Flight Review? 5/29/2001

Medical Cert.: Class 3	Medical Cert. Status: Valid Medical--w/ waivers/lim.	Date of Last Medical Exam: 12/6/2002

- Flight Time Matrix	All A/C	This Make and Model	Airplane Single Engine	Airplane Multi-Engine	Night	Instrument: Actual	Instrument: Simulated	Rotorcraft	Glider	Lighter Than Air
Total Time	1074	65	1074		114	107				
Pilot In Command(PIC)	1000		1000							
Instructor										
Last 90 Days	48		48		2	0				
Last 30 Days	0		0		0	0				
Last 24 Hours	0		0		0	0				

Seatbelt Used? Yes	Shoulder Harness Used? Yes	Toxicology Performed? Yes	Second Pilot? No

Flight Plan/Itinerary

Type of Flight Plan Filed: IFR

Departure Point	State	Airport Identifier	Departure Time	Time Zone
Ypsilanti	MI	YIP	1330	EDT

Destination	State	Airport Identifier
Billings	MT	BIL

Type of Clearance: IFR

Type of Airspace: Class E

Weather Information

Source of Briefing: National Weather Service

Method of Briefing: Telephone

National Transportation Safety Board

FACTUAL REPORT AVIATION

NTSB ID:	CHI04LA129
Occurrence Date:	5/31/2004
Occurrence Type:	Accident

Weather Information

WOF ID	Observation Time	Time Zone	WOF Elevation	WOF Distance From Accident Site	Direction From Accident Site
GRR	1356	EDT	794 Ft. MSL	25 NM	300 Deg. Mag.

Sky/Lowest Cloud Condition:	Ft. AGL	Condition of Light:	Day
Lowest Ceiling: Broken	2800 Ft. AGL	Visibility: 10 SM	Altimeter: 29.43 "Hg
Temperature: 21 °C	Dew Point: 13 °C	Wind Direction: 250	Density Altitude: 2250 Ft.
Wind Speed: 24	Gusts: 29	Weather Condtions at Accident Site:	Instrument Conditions
Visibility (RVR): Ft.	Visibility (RVV) SM	Intensity of Precipitation:	

Restrictions to Visibility:

Type of Precipitation:

Accident Information

Aircraft Damage: Destroyed	Aircraft Fire: None	Aircraft Explosion None

Classification: U.S. Registered/U.S. Soil

- Injury Summary Matrix	Fatal	Serious	Minor	None	TOTAL
First Pilot	1				1
Second Pilot					
Student Pilot					
Flight Instructor					
Check Pilot					
Flight Engineer					
Cabin Attendants					
Other Crew					
Passengers	2				2
- TOTAL ABOARD -	3				3
Other Ground					
- GRAND TOTAL -	3				3

Administrative Information
Investigator-In-Charge (IIC)
Andrew T Fox

Additional Persons Participating in This Accident/Incident Investigation:

Dan Diggins
Inspector
Federal Aviation Administration
Washington, DC

Barry Anshell
Controller
National Air Traffic Controllers Association
Chicago, IL

Robert Wolstenhorne
Technical Represenative
Lancair International Inc.
Redmond, OR

Carolyn B. Remol
Inspector
Federal Aviation Administration
Grand Rapids, MI 49588

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No.: 06-15443

[Dated March 20, 2007]

SUSAN HERTZ, Individually and as Personal Representative of the Estate of ROGER B. HERTZ, Deceased,

Plaintiff,

- against-

UNITED STATES OF AMERICA,

Defendant.

AFFIDAVIT OF SUSAN HERTZ

SUSAN HERTZ, being duly sworn, deposes and says:

1. I am the spouse of the decedent, Roger B. Hertz, one of the passengers killed on board a Hall Lancair IV-P experimental home-built aircraft, FAA registration number N707SH, which crashed near

Vermontville, Michigan on May 31, 2004. I submit this affidavit in further opposition to the motion to dismiss served by the defendant United States of America (the "United States"). I am also the Personal Representative of my husband's estate. A copy of the letter appointing me Personal Representative is attached hereto.

2. My husband and I were married on August 10, 1991. From the time of our marriage until Roger's death on May 31, 2004, we continuously resided together in Burlington, Ontario, Canada. My husband and I have two (2) children, Israel and Ariella Hertz, ages 2 and 1 respectively at the time of my husband's death. I am a citizen and resident of Burlington, Ontario, Canada and at the time of his death, my husband was also a citizen and resident of Canada.

3. On May 31, 2004 at approximately 10:00 p.m. local police officers from the Burlington, Ontario police department came to my home and advised me that my husband Roger had been killed in an airplane crash[1] This was the first that had learned that my husband had died.

4. My husband's body was not released until approximately one (1) week after his death and his funeral was held on June 9, 2004. From the time of his death until well after my husband's funeral, I did not discuss the facts of the accident with anyone. During this time, I was in a state of shock at the loss of my husband. Other than directing the funeral arrangements, I was unable to care for myself or my

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[1] Roger was traveling on business at the time of his death.

children. Family members, including my sister, mother and my husband's mother helped care for me and my children. I was unable to eat having lost approximately 12 pounds in the weeks after Roger's death. Also, I was not aware of any facts surrounding the crash whatsoever, except that the aircraft was a home-built aircraft. Neither my family or trends discussed the accident with me.

5. On June 25, 2004, on my own initiative, I contacted Andrew T. Fox, the National Transportation Safety Board's ("NTSB") Investigator-in-Charge ("IIC"") of the accident investigation as I wanted to learn of the facts surrounding my husband's death. I had been provided Mr. Fox's name by one of the local police officers who advised me that Mr. Fox was in charge of the accident investigation. At no time prior to this conversation did I have any contact with anyone from or associated with the NTSB nor did the NTSB contact me. In addition, other than very limited discussions with the local police department in Burlington, Ontario, and the local police department in Vermontville, Michigan, I had no discussions with anyone concerning the accident or the investigation into same. My conversations with police department personnel were limited to my husband Roger, the fact that he died in the crash, as well as making arrangements for the release of his remains. Not one of these conversations had anything to do with the cause of the accident because the accident investigation was being conducted exclusively by Mr. Fox and the NTSB.

6. My conversation with Ms. Fox on June 25, 2004 lasted for eleven (11) minutes. This was the only time that I spoke with anyone from the NTSB concerning

the accident investigation. A copy of my telephone records reflecting this eleven (11) minute conversation with Mr. Fox is also attached hereto.

7. It was during this conversation that I learned, for the first time, that the NTSB believed that the cause of the accident was related to air traffic controller negligence. Indeed, since I knew that the aircraft was home built, I had simply assumed that the accident was related to the aircraft itself.

8. During our conversation, Mr. Fox and I discussed the route of flight as well as the fact that the aircraft entered a "flat spin" prior to the crash. It was at this time that relatively "out of the blue", Mr. Fox advised that he will be talking to everyone at air traffic control concerning the accident. I asked him what he meant by this, and whether he believed that air traffic control played a part in the crash. Mr. Fox then advised me to my surprise that he had very serious concerns regarding air traffic control and he left me with the clear impression that the conduct of air traffic control caused the accident.

9. As aforementioned, at no time prior to my conversation with Mr. Fox was I aware of any facts whatsoever that indicated that air traffic control was somehow responsible for the accident. Neither I or anyone on my behalf was a party to the NTSB's accident investigation and I did not have access to my information that potentially implicated the failures of air traffic control as a cause of the accident. My conversation with Mr. Fox on June 25, 2004 was the only conversation that I ever had with anyone from the NTSB.

10. In July 2004, Sheldon L. Miller, Esq., of the law firm Sheldon L. Miller & Associates, as well as Linda Atkinson Miller, Esq., of the law firm Atkinson, Petruska, Kozma, Hart PC (collectively referred herein as "Prior Michigan Counsel") were retained to prosecute any and all causes of action against any entity responsible for the death of my husband, including the United States. In or about September 2006, I discharged Prior Michigan Counsel, and on October 26, 2006, I retained the law firm of Baumeister & Samuels, P.C. to prosecute any and all causes of action against any entity as a result of or in connection with the death of my husband.

Further affiant sayeth not.

Dated: March 20, 2007 /s/
SUSAN HERTZ

Sworn to before me this
20th day of March 2007.

/s/
Notary Public

ATTACHMENT 1
TO EXHIBIT B

pved, SCAO OSM CODE: LET

STATE OF MICHIGAN PROBATE
COURT COUNTY OF EATON

LETTERS OF AUTHORITY FOR
PERSONAL REPRESENTATIVE

File No. 05-39159-DE

Estate of Roger Barry Hertz, Deceased

TO: Name, address, and telephone no.

Susan Hertz
5230 Rome Crescent
Burlington, Ontario L7L7B7
(905) 331-9934

You have been appointed and qualified as personal representative of the estate on 02/28/2005. You are authorized to do and perform all acts authorized by law except as to the following:

[ ] Real estate or ownership interests in a business entity excluded from your responsibilities in your acceptance of appointment

[ ] Restrictions and limitations:

[ ] These letters expire: no expiration date

02/28/2005 /s/
Date Judge (formal proceedings)/Register (informal proceedings) Bar no.

SEE NOTICE OF DUTIES ON SECOND PAGE.

The Findling Law Firm
Darren Findling P51350
Attorney name (type or print) Bar no.

415 S. West St., Suite 200
Address

Royal Oak, MI 48067 (248) 399-3300
City, state, zip Telephone no.

I certify that I have compared this copy with the original on file and that it is a correct copy of the original and that these letters are in full force and effect as of the date on the letters.

02-28-2005 /s/
Date Register

Do not write below this line - For court use only

MCL 700.3103, MCL 700.3307, MCL 700.3414, MCL 700.3504, MCL 700.3601, MCR 5.202(A), MCR 5.206, MCR 5.307, MCR 5.310

ATTACHMENT 2
TO EXHIBIT B

Bell Account Summary

[*See fold-out exhibit, next 2 pages*]

APPENDIX F

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED
OMB NO.
1105-0008

1. Submit To Appropriate Federal Agency:

Assistant Chief Counsel, Litigation Division, AGC-400
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, Street, City, State and Zip Code) Estate of Roger Barry Hertz, deceased, by and through his personal representative, Susan Hertz

3. TYPE OF EMPLOYMENT
☐ MILITARY ☒ CIVILIAN

4. DATE OF BIRTH
2/14/1968

5. MARITAL STATUS
Married

6. DATE AND DAY OF ACCIDENT
5/31/2004 Monday

7. TIME (A.M. OR P.M.)
2:00 P.M.

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary.)

See attached. Addendum to Claim for Damage, Injury or Death

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED.
(See Instructions on reverse side.)

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT,

STATE NAME OF INJURED PERSON OR DECEDENT.

See attached, Addendum to Claim for Damage

11. **WITNESSES**

NAME

See attached, Addendum to Claim for Damage

ADDRESS (Number, Street, City, State, and Zip Code

See attached. Addendum to Claim for Damage

12. (See instructions on reverse.)

AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE

12b. PERSONAL INJURY
$1,000,000.00

12c. WRONGFUL DEATH
$8,500,000.00

12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
$9,500,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL

SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)
/s/

13b. Phone number of person signing form
905-331-9934

14. DATE OF SIGNATURE
May 9/06

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-1090

NSN 7540-00-634-4046

STANDARD FORM 95
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do your carry accident insurance? ☐ Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number. ☒ No

16. Have you filed a claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

☐ Full Coverage ☐
☒ No Deductible ☐

17. If deductible, state amount.

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts.)

19. Do you carry public liability and property damage insurance? ☐ Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code). ☐ No

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident

involves more than one claimant, each claimant should submit a separate claim form.

Complete all items -
Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FROM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A **SUM CERTAIN** FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM ACCRUES.

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item #12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damages to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

***(d)* Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.**

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Uses:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the

requested information or to execute the form may render your claim "invalid".

PAPERWORK REDUCTION ACT NOTICE

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Torts Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, D.C. 20530 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.

SF 95 BACK

ADDENDUM TO CLAIM FOR DAMAGE, INJURY OR DEATH

Estate of Roger Hertz, Deceased, by his Personal Representative Susan Hertz, Heirs and Survivors of Roger Hertz

In Re: Aircraft Accident near Vermontville, Michigan on May 31, 2004, involving the aircraft federally registered as N707SH

8. Basis of Claim

On May 31, 2004, a Hall Lancair IV-P aircraft, federally registered as N707SH, crashed near Vermontville, Michigan killing all three persons aboard, including the pilot, Allen C. Ward. This crash occurred when the accident airplane flew through into an area of adverse (extreme) weather and subsequently entered a flat spin causing it to impact the terrain. The accident airplane was on an instrument flight rules (IFR) flight plan and under Federal Aviation administration (FAA) radar control from departure through the time of impact with the ground.

The investigation to date as conducted by the National Transportation Safety Board, the Federal Aviation Administration, additional parties to the National Transportation Safety Board, Sheldon Miller & Associates, and The Law Offices of Mark Kelley Schwartz, P.C., demonstrate, without limitation, the following factual bases for this claim.

The FAA LAN Automated Flight Service Station (AFSS) failed to provide the pilot of the accident aircraft with complete and accurate weather information, including notification of SIGMET 43 Charlie;

The FAA Controller at Lansing Approach (LAN) was informed by the pilot that the accident aircraft was not equipped with weather radar and failed to properly, adequately and clearly pass along that information on at least one occasion to the other controller;

The FAA Cleveland Air Route Traffic Control Center (ZOB) – Jackson Sector, upon receiving the handoff from the LAN controller failed to advise the pilot of the accident aircraft of the adverse weather that existed along his route of flight;

The FAA Cleveland Air Route Traffic Control Center (ZOB) – Jackson Sector Controller cleared the accident aircraft to an en-route fix (MKE) which placed the accident aircraft's route of flight directly through adverse weather;

The FAA Cleveland Air Route Traffic Control Center (ZOB) – Jackson Sector Controller failed to adequately monitor, observe, and perform the necessary functions of his job duties in controlling the accident aircraft and providing weather services;

The FAA Cleveland Air Route Traffic Control Center (ZOB) – Jackson Sector Controller failed to provide any weather information (including

the severe weather in the accident aircraft's route of flight) to the pilot of the accident aircraft despite that information which was depicted, or alternatively, should or could have been depicted on his screen or on screens or other display terminals readily available to him for that purpose;

The FAA Cleveland Air Route Traffic Control Center (ZOB) – Jackson Sector Controller, knowing the type of aircraft and the weather conditions in and around his area of control, never inquired as to the weather avoidance equipment aboard the accident aircraft;

The FAA Cleveland Air Route Traffic Control Center (ZOB) – Jackson Sector Controller failed to advise the FAA Chicago Air Route Traffic Control Center (ZOA) Sparta Sector controller of the accident aircraft's request for deviation around adverse weather;

The FAA Chicago Air Route Traffic Control Center (ZOB) – Sparta Sector Controller failed to adequately monitor, observe, and perform the necessary functions of his job duties in controlling the accident aircraft and providing weather services;

The FAA Chicago Air Route Traffic Control Center (ZOA) Sparta Sector Controller knowing the type of aircraft and the weather conditions in and around his areas of control, never inquired as to the weather avoidance equipment aboard the accident aircraft, and,

> The FAA Chicago Air Route Traffic Control Center (ZOA) Sparta Sector Controller failed to recognize that the accident aircraft's route of flight placed it directly into an area of adverse weather.

See further, the attached National Transportation Safety Board Report and Docket at Exhibit 1.

As set forth, in relevant part, in the probable cause determination made by the National Transportation Safety Board:

> The airplane flew into a thunderstorm during cruise flight and subsequently entered a flat spin until impact with terrain. The airplane had been given a heading to avoid the adverse weather by Lansing approach control. During transfer of control between Lansing approach and Cleveland Center, the Cleveland controller was advised that the aircraft had been given a heading to avoid the adverse weather. After the handoff, the Cleveland controller instructed the pilot to precede direct to an in route fix when able, but did not provide any information about radar-observed weather ahead of the aircraft. The Chicago Center controller who next handled the airplane was briefed that the airplane was proceeding direct to the in route fix and had not requested any weather deviations. About seven minutes after the handoff between Cleveland and Chicago centers, the pilot transmitted, "center this is uh 707SH what do you show us in up here?" Aircraft and weather radar data showed the accident airplane flew into an area of level six precipitation (extreme weather) prior

> to a rapid loss of altitude. Several witnesses reported first hearing the sound of the revving aircraft engine before seeing the airplane descending rapidly in a spiraling descent. A pilot-rated witness reported that the airplane was in a "flat spin" before impacting the terrain.
>
> * * *
>
> The National Transportation Safety Board determines the probable cause of this accident as follows. The Air Route Traffic Control Center controllers not providing adverse weather avoidance assistance as required by FAA directives, resulting in the airplane flying into a thunderstorm and the pilot not been able to maintain aircraft control. A factor to the accident was the thunderstorm.

As a result of aforesaid facts, and without limitation, the following negligent and grossly negligent acts and omissions are claimed. The FAA controllers and personnel were both negligent and grossly negligent in the following manner:

> By allowing the accident aircraft to enter into the area of adverse and extreme weather conditions;
>
> By failing to warn the aircraft of the adverse and extreme weather conditions about which it was to enter or along its route of flight;
>
> By failing to abide by the pilot's request for weather avoidance;

By failing to make adequate inquiry as to the existence and type of weather avoidance aboard the accident aircraft;

By failing to provide vectors or alternate courses to the accident aircraft to avoid the adverse and extreme weather;

By giving the pilot vectors and courses which would take the accident aircraft directly through an area of adverse and extreme weather;

By failing to communicate to other controllers the pilot's request for weather deviations;

By failing to abide by the ATC Manual, FAA Handbook, FAA Practices, FAA Procedures and FAA Directives and Studies.

By other conduct, or by omission of such conduct, as more fully and completely set forth in the National Transportation Safety Board Report and the docket, including factual statements made by parties, groups (e.g, Air Traffic and Meteorology), committees, witnesses and the involved FAA personnel.

10. Nature and Extent of Injury that Forms the Basis of the Claim.

As a result of the negligence, gross negligence and other wrongful conduct alleged, the Estate of Roger Hertz, Deceased, by and through his Personal Representative, Susan Hertz, and the Survivors and Heirs of Roger Hertz, claim the following, without

limitation, economic losses in past, present and future; pain and suffering damages in the past, present and future; burial and medical expenses in the past, present and future; conscious knowledge of impending death; conscious pain and suffering in the past present and future; emotional pain and anguish in the past, present and future; loss of services in the past, present and future; loss of support in the past, present and future, loss of enjoyment of life in the past, present and future; loss of inheritance in the past, present and future; loss of consortium in the past, present and future; fright, terror, shock and mortification in the past, present and future; exemplary damages in the past present and future, attorneys' fees, costs and expenses in the past, present and future; as well as all other damages, reparations and recoveries as permitted by applicable law.

Biographical Information Pertinent to the Nature and Extent of the Injury

Dr. Roger Hertz was a man with a glowing future. On May 31, 2004, the date of his death, he looked forward to a long and fulfilling life, in which he would be gainfully employed.

Education

Dr. Hertz completed high school in Saskatoon, Saskatchewan I 1984. Thereafter he briefly attended Canadian Bible College, but then attended the University of Saskatchewan, graduating first in his class, with a Bachelor of Science in mechanical engineering. He proceeded to the University of Toronto Engineering School and gained his Ph.D. in aerospace engineering.

Employment

After receiving his Ph.D., Dr. ~~Ward~~ Hertz joined ~~TRS~~ CRS Robotics Corp. and its successor company, Thermo Electron. There, he was extremely successful in all of his endeavors. Indeed, at the time of his death, he was responsible for three engineering departments. His forte was research and development, and in recent months he had become acquainted with Alan Ward of Ward Synthessis, Inc., Ypsilanti, Micigan.

Ward Synthesis, Inc. specialized in "lean product development." Dr. Hertz was enthusiastic about the lean development concept. Thus, he gave notice to Thermal Electronic, expecting to join Ward Synthesis after May, 2004. His plan was to consult with Ward Synthesis, Inc. as a self-employed businessman. Toward that end, he signed a consulting contract with Ward Synthesis. On May 31, 2004, Dr. Hertz was on his way to the western United States to participate as a consultant with Ward Synthesis.

While working at Thermal Electronic, Dr. Hertz was earning $130,000 per year. The consulting contract with Ward Synthesis set forth his remuneration at $2,400 per day. Dr. Hertz anticipated that he would consult three days per week (on the road) and be home four days per week.

Dr. Hertz's long term goal was to introduce Lean Product Development to the pharmaceutical industry. He planned to work in product development with Alan Ward for a number of years and then to utilized his expertise to revitalize other companies, in which he would acquire an ownership interest. Notably, Ward Synthesis, was a dynamically growing organization. It

had been given the go-ahead to completely re-engineer Hewlett-Packard's ink jet printer division, using the methodologies and systematic approaches for lean product development.

Family Loss

Dr. Hertz, tragically, left behind his two young daughters and his wife. At the time of his demise, Dr. Hertz was in excellent health with a radiant future to forward to. In addition to his immediate family, he also left behind his parents and three brothers. Dr. Hertz's wife is attempting to deal with her grief by attending "COPING," a grief center in Cambridge, Ontario. His older daughter, Israel, three years old, is having difficulty with the loss of her father, as she cannot understand why her father was taken away.

Although Dr. Hertz's services about the home included a wide range of chores and services, the loss of these services cannot compare to the emotional loss and the financial loss due to the loss of decades of significant earnings.

In support of the claims made herein, the following documents are attached:

A. Master Business License, Ontario Province.
B. Consulting contract with Ward Synthesis, Inc.
C. Professional resume.
D. Employment agreement between Hertz and CRS Robotics Corp.
E. Federal Tax Returns for Hertz 2000 through 2004
F. Doctor of Philosophy, University of Toronto.

G. Bachelor of Science, University of Saskatchewan
H. Michigan Letter of Authority Appointing Susan Hertz Personal Representative of the Estate of Roger Hertz, dec'd
I. Certificate of Death

11. Witnesses

All persons, parties and entities noted in the reports and docket of the National Transportation Safety Board concerning this aircraft crash.

Personnel, record custodians, employees, agents, contractors, servants of the Federal Aviation Administration, Washington, D.C.

Personnel, record custodians, employees, agents, contractors, servants of the Federal Aviation Administration, Cleveland Air Route Traffic Control Center, Oberlin, Ohio.

Personnel, record custodians, employees, agents, contractors, servants of the Federal Aviation Administration, Chicago Air Route Traffic Control Center, Aurora, Illinois.

Personnel, record custodians, employees, agents, contractors, servants of the National Transportation Safety Board, Washington, D.C.

Susan Hertz, Individually and as Personal Representative of the Estate of ~~Allen C. Ward~~ Roger Hertz, Deceased c/o Sheldon Miller & Associates, 3000 Town Center, Suite 1700, Southfield, MI, 48075.

BEST AVAILABLE COPY

Record custodians, personnel, employees, agents of the Eaton County Sheriff's Department, 1025 Independence Blvd, Charlotte, Michigan.

Records custodians, personnel, employees, agents of the Eaton County Medical Examiners Office, Eaton County, Michigan.

Robert Leeser, M.D., and Records Custodian of Robert Leeser, M.D., 123 Lansing Road, Charlotte, MI 48813

Record custodians, personnel, employees, agents, franchises of Express Services, Inc. 8516 Northwest Expressway, Oklahoma City, OK 73162

Hope Alexander, (Responsible for Wreckage Preservation and Retention) 416 Augusta St, Elmore, OH 43416.

Record custodians, former employees, contractors, accountants, joint-venturers of Ward Synthesis, Inc., Ypsilanti, Michigan.

Record custodians, former employees, contractors, accountants of ~~TRS~~ CRS Robotics Corp. and its successor company, Thermo Electron.

Ontario

Master Business License

Date Issued: 2004-03-24
(yyyy-mm-dd)

Business Name and Mailing Address:

LEAN PRODUCT CONSULTING

424-2000 APPLEBY LINE
BURLINGTON ON L7L 7H7

Business
Address: SAME AS ABOVE

Telephone: (905) 331-9934 Ext:
Fax: (905) 315-8495

E-Mail:

Legal
Name(s): ROGER BARRY HERTZ

Type of
Legal Entity: SOLE PROPRIETORSHIP

Business Information

BUSINESS NAME REGISTRATION

Number
140349887

Effective Date (yyyy-mm-dd)
2004-03-24

Expiry Date (yyyy-mm-dd)
2009-03-23

To the Client: When the Master Business License is presented to any Ontario business program, you are not required to repeat information contained on this licence. Each Ontario business program is required to accept this licence when presented as part of its registration process.
Call the Ontario Business Connects Helpline at 1-800-565-1921 or (416) 314-9151 or TDD (416) 326-8566 if you have any problems.

To the Ontario business program: A client is not required to repeat any information contained in this licence in any other form used in your registration process.

98/11

Consulting Contract

Ward Synthesis Inc of Ypsilanti Michigan (hereinafter called "WSI") desire to utilize the professional and expert assistance of Dr. Roger B. Hertz, President of Lean Product Consulting of Burlington Ontario (hereinafter called "the Consultant") in the field or fields in which the Consultant has professional qualifications.

1. **Parties and Relationships**
   WSI is a an incorporated US business engaged in management and engineering consulting services that are directed toward improving the managerial, operating, and economic performance of companies by analyzing and resolving strategic and operating problems in the area of product development, research & development and engineering. The Consultant is a person who by education, training and experience is uniquely skilled in the provision of the service required.

2. **Character and Extent of Services**

a) It is the mutual intent of the parties that the Consultant shall act strictly in a professional consulting capacity as an independent contractor for the purposes and in all situations and shall not be considered an employee of WSI.
b) WSI and the Consultant will mutually determine of the manner and selection of methods with respect to rendering the Consultant's professional consulting services to WSI.
c) The Consultant agrees to perform his activities in accordance with the highest and best state of the art in the profession.

3. Period of Service and Termination

a) The period of service by the Consultant under this agreement shall be from April 1, 2004 through March 31, 2005 and may be renewed upon the mutual agreement of the parties hereto.

b) Either WSI or the Consultant may terminate this agreement by giving the other party 30 days' written notice of intention of such action.

c) WSI reserves the right to halt or terminate the conduct of a seminar-workshop by the Consultant without prior notice or claim for additional compensation should, in the opinion of WSI, such conduct not be in the best interest of WSI.

4. Compensation

a) Upon the Consultant's acceptance hereof, WSI agrees to pay the Consultant according to the following schedule:

   i. $1,400 (US) per day or 62.5% of total WSI consulting fee, whichever is greater, while on the premises of a paying WSI customer.

b) In the event that WSI desires, and it is mutually agreed to by the Consultant, the Consultant's services may be used in activities not specifically identified in paragraph 4(a). In such cases, WSI agrees to pay the Consultant on the basis of the following schedule

   i. Intellectual property development at $60 (US) per hour.

   ii. The Consultant will not charge hourly fee for mutually agreed training activities.

c) In the event of special circumstances, variations to the fee schedule of paragraphs 4(a) and 4(b) will be allowed as mutually agreed in writing by the parties hereto.

5. Notification

The Consultant will be notified by WSI in writing to begin his participation in specific seminar-workshops and/or consulting assignments to which the fee schedule of paragraphs 4(a) and 4(b) applies. Such notification will include a statement of the time(s) and place(s) of the intended seminar/consultation involvement with other necessary information.

6. Expenses

The Consultant, as an independent contractor, shall be responsible for any expenses incurred in supporting clients. Reasonable expenses are those the client will reimburse, and will be reimbursed to the Consultant by WSI, including:

i. Commercial flights, economy class seating.
ii. Car rental, mid-size or below class of vehicle.
iii. If a personal vehicle is used, mileage at a rate of $0.35 per mile.
iv. Travel expenses, such as tolls & parking.
v. Accommodations at a mutually agreeable hotel.
vi. Meals.
vii. Supplies required to perform duties while onsite.

A copy of the receipts for reasonable expenses will be provided to WSI by the Consultant upon request. Other expenses should be agreed to in advance.

7. Method of Payment

a) The Consultant shall be paid as provided for in paragraphs 4(a) and 4(b) hereof, on the basis of a properly executed "Invoice" form (sample attached).

b) The "Invoice" form is to be submitted at the end of each week that the consulting services are performed. Exceptions to this arrangement are allowed with the written approval of WSI.

c) Payment to the Consultant will be made by check, delivered by mail postmarked no later than 60 days subsequent to receipt of the "Invoice" form as provided in paragraphs 7(a) and 7(b).

8. Copyrights

a) The Consultant agrees that WSI shall determine the disposition of the title to and the rights under any copyright secured by the Consultant on copyrightable material first produced or composed and delivered to WSI under this agreement. The Consultant hereby grants to WSI a royalty-free, nonexclusive, irrevocable license to reproduce. translate, publish, use, and dispose of, and to authorize other to do so, all copyrighted or copyrightable work not first produced or composed by the Consultant in the performance of this agreement but which is incorporated into the material furnished under this agreement, provided that such license shall be only to the extent the Consultant now has or prior to the completion or final settlement of this agreement may acquire the right to such license without becoming liable to pay compensation to other solely because of such grant.

b) The Consultant agrees that he will not knowingly include any copyrighted material in any written or copyrightable material furnished or delivered under this agreement without a license as provided

in paragraph 8(a) hereof or without the consent of the copyright owner, unless specific written approval of WSI to the inclusion of such copyrighted material is secured.

c) The Consultant agrees to report in writing to WSI promptly and in reasonable detail any notice or claim of copyright infringement received by the Consultant with respect to any material under this agreement.

9. Drawings, Designs, Specifications

a) All drawings, sketches, designs, design data, specifications, notebooks, technical and scientific data, and all photographs, images, reports, findings, recommendations, data, and memoranda of every description relating thereto, as well as copies of the foregoing, relating to the work performed under this agreement or any part thereof, shall be subject to he inspection of WSI at all reasonable times; and the Consultant shall afford WSI proper facilities for such inspection; and further shall be the property of WSI and may be used by WSI for any purpose whatsoever without any claim on the part of the Consultant for additional compensation, and subject to the right of the Consultant to retain a copy of said material shall be delivered to WSI or otherwise disposed of by the Consultant, either as WSI may from time to time direct during the progress of the work, on in any event, as WSI shall direct upon the completion or termination of this agreement.

10. Confidentiality

a) It is understood that in the performance of his duties, the Consultant will obtain information about both WSI and WSI's clients, and that such

information may include financial data, client lists, methods of operating, policy statements, engineering data, and other confidential data.

b) The Consultant agrees to restrict his use of such above-mentioned information to the performance of his duties described in this agreement. The Consultant further agrees to return to WSI and to WSI's clients upon the completion of his duties any and all documents (originals and copies) taken from either organization to facilitate the performance of duties described herein, and to secure such material against theft by others.

11. Non-Competition

The Consultant agrees that he will not perform his professional services for any organization known to the Consultant to be a client of WSI unless WSI has employed the Consultant for the provision of such services to the client while this agreement is in affect. In addition, the Consultant will not perform his professional services in the area of product development consulting for non-WSI clients while this agreement is in effect, or for a period of one year after termination of the agreement.

12. Applicable Law

The parties agree that this agreement is to be construed according to the laws of the State of Michigan, USA. Under the laws of Michigan, this type of engineering consulting services that the Consultant will be engaged in does not require a state license.

13. Assignment

WSI or the Consultant may not assign or transfer this agreement, any interest therein or claim

thereunder without the written approval of both parties.

14. Integration

This agreement, executed in duplicate, constitutes the entire contract between the parties and may be canceled, modified, or amended only by a written supplemental document executed by each of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have accepted and executed this agreement this 27th day of May, 2004.

/s/ _____
Roger Hertz, Consultant

by: /s/ _____ (Witness)
(Authorized signatory)

/s/ _____
Ward Synthesis Incorporated

Professional Resume

Roger B. Hertz, Ph.D.
5230 Rome Crescent
Burlington, Ontario, Canada
L7L-LB7

(905) 331-9934 (home)
(905) 541 -5004 (cell)
roger.hertz@thermo.com

Relevant Employment Experience

Thermo Electron, Laboratory Automation & Integration, (formerly CRS Robotics Corporation),
Burlington, Ontario, Canada
Career History & Contributions:

Title	*Reporting to*	*Dates*	*Responsibilities & Contributions*
Vice President R&D	President / GM	Apr 2002 – present	Responsible for 3 engineering departments (Hardware, Software & Manufacturing) with 22 staff. Achieved 93% of major milestones, and fast time to market on new products in 2002. Continued R&D process improvements in software engineering. Took on interim responsibility for Thermo Labsystems R&D department in Finland. Currently working on cross-business unit R&D projects within Thermo Electron.
Director of R&D	President & CEO	Sep 2001 – Apr 2002	Led a company-wide team to successful launch of Dimension4 product. Led effort to improved IP position of company. Significantly improved hardware R&D effectiveness through Lean Product Development changes. Agent for positive organizational change.

Title	*Reporting to*	*Dates*	*Responsibilities & Contributions*
R&D Manager, Robot Division	Chief Technical Officer Managing Director, Robot Division	Jan 1999 – Aug 2001 Jan 1998 – Dec 1998	Department management & budget responsibility. Strategic planning, team building, leadership & coordination of 12 technical staff. Leadership mentoring/ development. Numerous product launches & quality improvements. Customer projects technical interface.
R&D Group Leader	VP Engineering	Jan 1997 – Dec 1997	Managed new product development. Robot application contributions.
Mechanical Engineer	VP Engineering	Jan 1995 – Dec 1996	Lead mechanical designer & project manager. New F3 robot arm product.
Engineering Intern	VP Engineering	May 1994 – Aug 1994	Embedded software. Product performance and safety improvements.

Dynacon Enterprises Ltd, Mississauga, Ontario, Canada
Research Engineer (Part-Time)
September 1991 – December 1992

- Developed a computer-based simulation used to verify control algorithms for a space-based tracking antenna.

Education

1990 – 1998: **Ph.D. in Aerospace Engineering,** University of Toronto, Ontario, Canada
Fast-tracked directly from a Master's into Ph.D. program.
Thesis Title: "Kinematics and Design of a Class of Parallel Manipulators"

1986 – 1990: **Bachelor of Science in Mechanical Engineering,** University of Saskatchewan, Canada
Graduated #1 in my class, with great distinction.

Patents

- R.B. Hertz and D.C McCrackin, *Linear Conveyer System*, Application #09/870,075, May 30, 2001
- H. Haas, T.J. Jones, R.B. Hertz et. al., *Modular Drug Discovery™ System, Application #60/350,943.* Jan 24, 2002.
- S. Treadwell J. Cheung, R. Hertz, I. Hatherley and M. Riff, *Robotic Device*, US Industrial Design Patent #D484154 for the "Flip Mover", filed Jan 25, 2002, granted Dec 23, 2003.

Selected Publications & Presentations

- R.B. Hertz, "Lean Product Development Implementation at Thermo Electron". Workshop talk given at the *International Association of Product Development (IAPD) Workshop #41*, Nov 3-5, 2003, Boston, MA.
- D.C. McCrackin and R.B. Hertz, "CRS Dimension4 High-Speed Distributed Motion System", *Robotics Today Online*, First Quarter 2003, Volume 16, No. 1.
- R.B. Hertz, "Practical Implementation of Lean Product Development at Thermo CRS". Invited talk given at the *First Lean Product Development Conference*, Oct 22-23, 2002, Ann Arbor, Michigan.
- M. Peck. G. Rogers and R. Hertz, "Combining Static Scheduling and Dynamic Rescheduling", poster session presented at LabAutomation conference Jan 30, 2002.
- R.B. Hertz and P.C. Hughes, "Kinematic Analysis of a General Double-Tripod Parallel Manipulator," *Mechanism and Machine Theory*, Vol. 33, No. 6, pp. 683-689, 1998.
- Roger B. Hertz, *Kinematics and Design of a Class of Parallel Manipulators*, Ph.D. Thesis, University of Toronto, Aerospace Engineering, Toronto, Ontario, Canada, Feb 1998.
- R.B. Hertz and P.C. Hughes, "Kinematics and design of a new parallel industrial manipulator," in *The Fifth National Applied Mechanisms and Robotics Conference*, Vol. 1, (Cincinnati, Ohio), AMR97-019, Oct 1997.
- R.B. Hertz and P.C. Hughes, "Kinematic analysis of a class of spatial parallel manipulators with three degrees of freedom," in *Design Engineering: Robotics: Kinematics,*

Dynamics and Controls, Vol. 72, (Minneapolis, Minnesota), pp. 279-384, ASME, Sept 1994.

- R.B. Hertz and P.C. Hughes, "Forward kinematics of a 3-DOF variable-geometry-truss manipulator," in *Computational Kinematics* (J. Angeles, G. Hommel, and P. Kovacs, eds.), pp. 241-250, Kluwer Academic Publishers, 1993.
- A. Durand, R. Hertz, D. Mitchell, and K. Rezkallah, "Design and Analysis of a Modular Micro-gravity Test Platform for Use Aboard the NASA KC-1 35 Aircraft," in Proceedings, *Second Workshop on Micro-gravity Experimentation*, May, 1990.

Hobbies
Singing, mountain biking, hockey & guitar

References
Available Upon Request

EMPLOYMENT AGREEMENT

THIS AGREEMENT is made as of the date set out in Schedule A.

BETWEEN:

CRS ROBOTICS CORPORATION, a corporation incorporated under the laws of the Province of Ontario,

(the **"Corporation"**)

- and -

The Executive whose name appears in Schedule A attached hereto

(the **"Executive"**)

RECITALS:

A. The Corporation together with its subsidiaries (collectively, the "CRS Group") are involved in the business of the design, manufacture and distribution of advanced laboratory automation technology.

B. The Corporation and the Executive wish to enter into this Agreement to set forth the rights and obligations of each of them as regards the Executive's employment for their mutual benefit and to reflect the nature of the Executive's employment by a public corporation.

NOW THEREFORE IN CONSIDERATION OF THE MUTUAL COVENANTS AND

AGREEMENTS CONTAINED IN THIS AGREEMENT AND OTHER GOOD AND VALUABLE CONSIDERATION (THE RECEIPT AND SUFFICIENCY OF WHICH ARE HEREBY ACKNOWLEDGED), THE CORPORATION AND THE EXECUTIVE AGREE AS FOLLOWS:

1. **Definitions**

(a) In this Agreement,

"Adjusted Year of Employment" means the period commencing on the date which is the commencement of the Term as set out in Schedule "A" and ending December 31, 2001.

"Agreement" means this Agreement and all schedules attached to this agreement, in each case as they may be amended or supplemented from time to time;

"Board of Directors" means the Board of Directors of the Corporation;

"Business Day" means any day, other than Saturday, Sunday or any statutory holiday in the Province of Ontario;

"Business of the Corporation" means the design, manufacture and distribution of advanced laboratory automation technology;

"Change of Control of the Corporation" means the occurrence of a transaction or series of transactions as a result of which the Corporation becomes controlled by a Person; for

the purpose of the foregoing, with any of its affiliates, beneficially owns shares of the Corporation carrying more than 50.01% of the voting rights ordinarily exercisable at meetings of shareholders of the Corporation, such rights being sufficient to elect a majority of the directors of the Corporation;

"Human Resource and Compensation Committee" means the compensation committee of the Board of Directors of the Corporation;

"Competitive Business" means any aspect of the following business carried on anywhere in Canada, the United States, Europe, the United Kingdom, Sweden, Norway and Japan; the design, manufacture and distribution of advanced laboratory automation technology or any other technology, application or service incidental to any of the foregoing;

"Confidential Information" means all confidential or proprietary information, Intellectual Property (including trade secrets) and confidential facts relating to the business or affairs of the Corporation or the CRS Group, whether or not originated by the Executive including, without limitation, work product resulting from or related to work or projects performed or to be performed by the Corporation or the CRS Group, internal personnel and financial information of the Corporation or the CRS Group, vendor names and other vendor information, purchasing and internal cost information, service and

operational manuals, the manner and method of conducting the business of the Corporation or the CRS Group, marketing and development plans and agreements, price and cost data, price and fee amounts, pricing and billing policies, quoting procedures, marketing techniques, methods of obtaining business, forecasts and forecast assumptions and volumes, future plans and potential strategies of the Corporation or the CRS Group which have been or are being discussed, ideas concerning proposed projects, contracts and their contents, client services, data provided by clients and the type, quantity and specifications of products and services, purchased, leased, licensed, engaged, employed or received by the Corporation or the CRS Group or by clients of the Corporation or the CRS Group, business plans, customer, client and vendor lists, business deals with any of these, financing, acquisition, production, development and distribution agreements and budgets and investment opportunities and structures;

"Disability" means the mental or physical state of the Executive such that the Executive qualifies for disability coverage as prescribed under the Corporation's disability plan as it exists from time to time and the Executive is unable to fulfil his obligations under this Agreement either for any consecutive 180 day period or for any period of 180 days (whether or not consecutive) in any consecutive 365 day period;

"ESA" means the Employment Standards Act (Ontario) as the same may be amended from time to time and any successor legislation thereto or similar legislation governing the employment of the Executive;

"Intellectual Property" means all legally recognized rights which result or derive from the Executive's services provided to the Corporation or the CRS Group or with the knowledge, use or incorporation of Confidential Information, and includes but is not limited to developments, inventions, designs, works of authorship, improvements and ideas, whether or not patentable or copyrightable, conceived or made by the Executive (individually or in collaboration with others) during the Term or which result from or derive from the Corporation's or the CRS Group's resources or which are reasonably related to the business of the Corporation or the CRS Group.

"Just Cause" means: (i) the failure of the Executive to properly carry out his material duties after written notice by the Corporation of the failure to do so (specifying the breach) and an opportunity for the Executive to correct the same within a reasonable time from the date of receipt of such notice, (ii) theft, fraud, dishonesty or misconduct by the Executive involving the property, business or affairs of the Corporation or the CRS Group or the carrying out of the Executive's material duties; or (iii) any breach or non-observance by the Executive of any term of this Agreement;

"Person" means any individual, partnership, limited partnership, joint venture, syndicate, sole proprietorship, company or corporation with or without share capital, unincorporated association, trust, trustee, executor, administrator or other legal personal representative, regulatory body or agency, government or governmental agency, authority or entity however designated or constituted;

"Plans" means individually and collectively, the Share Purchase Plan and the Stock Option Plan;

"Rules" means all regulatory laws governing the issuance of options, including all requisite TSE rules and all laws and regulations under the Securities Act (Ontario);

"Stock Option Plan" means the Stock Option Plan of the Corporation dated as of September 27, 2000 as amended from time to time;

"Term" has the meaning set out in Section 3;

"TSE" means the Toronto Stock Exchange;

"Year of Employment" means thereafter each 12 month calendar period commencing January 1 and ending December 31 commencing after the expiry of the Adjusted Year of Employment.

2. Employment of the Executive

The Corporation will employ the Executive, and the Executive will serve the Corporation, in the position,

and in the duties and responsibilities as set out in Schedule A and, subject to the consent of the Executive, in positions assigned by the Board of Directors from time to time that are consistent with the Executive's skills and experience. The Executive shall comply with all rules, regulations and instructions of the Corporation now in force, or which may be adopted from time to time, and communicated by the Corporation to its employees.

3. Term

The Executive's employment will, subject to section 9, be for the term specified in Schedule A attached hereto (the "Term").

4. Performance of Duties

During the Term, the Executive will faithfully, honestly and diligently serve the Corporation and the CRS Group. The Executive will (except in the case of illness or accident) devote his full working time and effort so as to ensure the effective management of the Corporation and will use his best efforts to promote the interests of the Corporation. During the Term, the Executive will present to the Corporation all of his ideas concerning the Business of the Corporation.

5. Remuneration

(a) Basic Remuneration. The Corporation will pay the Executive a gross annual salary (the "Salary") in the amount set out in Schedule A and thereafter in an amount determined by the Board of Directors from time to time in respect to the Adjusted Year of Employment or each Year of Employment (before

deduction for income taxes and other required deductions, such as Canada Pension Plan and Unemployment Insurance contributions, but excluding the Benefits paid by the Corporation as provided in section 5(b), but not less than the amount in Schedule A (unless waived by the Executive)). The Salary will be payable in equal instalments bi-weekly in arrears in each month during the Adjusted Year of Employment and each Year of Employment thereafter.

(b) Benefits. The Corporation will provide to the Executive the benefits set out in Schedule A and any benefits provided from time to time to employees of the Corporation generally as well as a benefits allowance in an amount to be determined by the Board of Directors from time to time in its sole discretion (the "Benefits"). In addition, the Executive will be entitled to participate in accordance with and subject to the terms and conditions of any applicable fund, plan or arrangement relating to senior executives of the Corporation in effect generally from time to time with respect to the CRS Group.

(c) Bonus Remuneration. The Executive will be entitled to receive such bonus remuneration, if any, in respect of the Adjusted Year of Employment and each Year of Employment thereafter during the Term, as the Board of Directors may determine based on the criteria set out in Schedule A.

(d) Pro-Rata Entitlement in the Event of Termination. If the Executive's employment is terminated pursuant to section 9 the Executive will receive (in addition to any other amounts payable pursuant to section 9), the appropriate pro-rata portion of the Executive's Salary, Benefits and bonus

remuneration (if any) in respect of the Adjusted Year of Employment or the Year of Employment in which the effective date of the termination of employment occurs.

6. Expenses

The Corporation will, upon presentation of expense statements or receipts and such other supporting documentation as the Corporation may reasonably require, pay or reimburse the Executive in accordance with the Corporation's expense policies for all travel and out-of-pocket expenses reasonably incurred or paid by the Executive in the performance of his duties and responsibilities.

7. Vacation

The Executive will be entitled during the Adjusted Term of Employment and each Year of Employment during the Term to such period of vacation with pay as set out in Schedule A or such greater amount as the Board of Directors, in its sole discretion, may authorize, provided that the Executive will be entitled to at least the minimum number of weeks required by the ESA.

8. Share Purchase Plan and Stock Option Plan

The Executive will be entitled to participate in the Share Purchase Plan, if such plan is being offered by the Corporation.

The Executive may be entitled to participate in the Stock Option Plan from time to time to the extent that

the Board of Directors, in its sole discretion, may determine.

9. Termination

(a) Notice. The Executive's employment may be terminated at any time:

(i) by the Corporation without prior notice and without further obligations to the Executive for reasons of Just Cause or Disability;

(ii) on prior written notice by the Executive on the terms set out in Schedule B; or

(iii) in any other case, by the Corporation on the terms as set out in Schedule B.

Termination of the Executive's employment by the Corporation pursuant to clause 9(a)(i) or clause 9(a)(iii) may be undertaken only under the authority of a resolution of the Board of Directors approved by a majority of the directors.

The Executive's employment will be terminated in the event of the Executive's death. In the case of such event, the Basic Remuneration, Benefits and Expenses, if any, set out in sections 5 and 6 shall continue to be paid and provided by the Corporation to the named beneficiary of the Executive listed in Schedule B for a period of 90 days following the date of termination. With the exception of payments described in the preceding sentence, there will be no further obligation on the part of the Corporation or the CRS

Group (except as to the pro-rata entitlements referred to in clause 5(d) upon the Executive's death.

(b) Effective Date: The effective date on which the Executive's employment will be deemed to have been terminated will be:

(i) in the case of termination under clause 9(a)(i), the day on which the Executive is deemed, under section 18, to have received notice from the Corporation of termination;

(ii) in the case of termination under clauses 9(a)(ii) or (iii), and subject to section 10, the last day of the minimum period referred to in the relevant paragraph; and

(iii) in the case of the death of the Executive, on the date of the Executive's death.

(c) Change of Control. If there is a Change of Control of the Corporation and without the consent of the Executive, the Executive is: (a) demoted or (b) the Salary is reduced; or (c) the job title, duties or responsibilities are materially modified; or (d) the terms and conditions of the Executive's employment are otherwise materially changed, the Executive may, within 60 days of being advised of the same, give notice to the Corporation that he is leaving its employment, and such leaving shall be treated for all purposes of this Agreement as a termination by the Corporation of the Executive's employment pursuant to section 9(a)(iii).

(d) Rights of Executive on Termination and Lump Sum Payment. Where the Executive's employment under this Agreement has been terminated by the Corporation under section 9(a)(iii), the Executive shall be entitled, upon receipt by the Corporation of appropriate releases, resignations, and other similar documentation, to receive from the Corporation, in addition to accrued but unpaid Salary and bonus remuneration, if any, a lump sum payment equal to the amount set out in Schedule B, less any amounts owing by the Executive to the Corporation for any reason. Such amount shall be paid by the Corporation to the Executive in instalments, each instalment to be equivalent to the Executive's current periodic salary and benefit entitlement and payable at the same intervals as would be the case had the Executive remained as an employee of the Corporation. All payments made by the Corporation in respect of the severance payment shall be subject to all required deductions for income tax and other statutory withholdings.

(e) No Other Entitlement. Except as provided above in this section 9, where the Executive's employment has been terminated by the Executive or terminated or deemed to have been terminated by the Corporation for any reason, the Executive will not be entitled, except to the extent required under any mandatory employment standard under the ESA, to receive any payment as termination pay, severance pay, in lieu of notice, or as damages. Except as to any entitlement as provided above, the Executive hereby waives any claims the Executive may have against the Corporation for or in respect of termination pay, severance pay, or on account of loss of office or employment or notice m lieu thereof or damages in lieu

thereof (other than rights pursuant to subsection 5(d). Payments to the Executive upon termination (or performance pursuant to section 10) in accordance with this Agreement by the Corporation will be deemed to include and to satisfy entitlement to termination pay and severance pay pursuant to the ESA to the extent of such payments.

10. Consulting Arrangement Option

Intentionally deleted.

11. Return of Materials Upon Termination

Upon termination of the Executive's employment by the Corporation, the Executive will promptly deliver to the Corporation all property of or belonging to or administered by the Corporation or the CRS Group, including without limitation, all documents, manuals, customer, supplier, product and other proprietary lists, data, records, computer programs, codes, materials, prototypes, products, samples, analyses, reports, marketing materials, equipment, tools and devices relating or pertaining to any Intellectual Property or Confidential Information, including all copies or reproductions of the same.

12. Non-Competition

The Executive acknowledges the competitive and proprietary nature of the business carried on by the CRS Group and the interests of the CRS Group in limiting, on a reasonable basis, the ability of its employees and former employees to carry on a Competitive Business.

Accordingly, the Executive will not, either during the Term or for a period of 12 months thereafter, directly or indirectly, in any manner whatsoever including, without limitation, either individually, or in partnership, jointly or in conjunction with any other Person, or as employee, principal, agent, director or shareholder:

(a) be engaged in any undertaking;
(b) have any financial or other interest (including an interest by way of royalty or other compensation arrangements) in or in respect of the business of any Person which carries on a business; or
(c) advise, lend money to, guarantee the debts or obligations of or permit the use of the Executive's name or any part thereof by any Person which carries on a business;

anywhere in Canada, the United States, Europe, the United Kingdom, Sweden, Norway and Japan, if the undertaking or the business, as the case may be, is a Competitive Business.

Nothing in this section 12 will operate to prevent the Executive from owning, on a passive investment basis, up to 5% of the issued shares of a Competitive Business, the shares of which are traded on a recognized stock exchange or traded in the over-the-counter market in Canada or elsewhere.

13. No Solicitation of Employees or Consultants

The Executive acknowledges the importance to the business carried on by the CRS Group of the human

resources engaged and developed by the CRS Group and the unique access that the Executive's employment and other involvement with the CRS Group offers to interfere with these resources. Accordingly, the Executive will not, during the Term and for the period of 12 months thereafter, directly or indirectly, employ, be employed by, enter into a partnership or other association with or retain as an independent contractor or be retained as an independent contractor by, any employee of or consultant to the Corporation or the CRS Group or induce or solicit, or attempt or induce, any such person to leave that person's employment or engagement.

14. Confidentiality

The Executive will not, during the Term and at any time thereafter, directly or indirectly, other than as required by his duties use or disclose to any person any Confidential Information unless:

(a) the Confidential Information is available to the public or in the public domain at the time of such disclosure or use without breach of this Agreement or any similar agreement between the Corporation and other employees or consultants; or

(b) disclosure of the Confidential Information is required to be made by any law, regulation, governmental authority or court, provided that, before disclosure is made, notice of the requirement is provided to the Corporation and (to the extent possible in the circumstances) the Corporation is afforded an opportunity to dispute the requirements.

The Executive's obligations under this section 14 are to remain in effect for ten years and will exist and continue in full force and effect notwithstanding any breach or repudiation or any alleged breach or repudiation of this Agreement by the Corporation.

15. Patents and Copyrights

During the Term, the Executive agrees to disclose to the Corporation all Intellectual Property developed by the Executive, either individually or in collaboration with others, which relates directly or indirectly to the business of the Corporation or the CRS Group. The Executive acknowledges and agrees that all right, title and interest of any kind whatsoever in and to the Intellectual Property, including the foregoing and any patents and copyrights, is and will be the exclusive property of the Corporation and the Corporation will have absolute discretion to determine how such Intellectual Property is used. All work done during the Term by the Executive for the Corporation or a member of the CRS Group is a work for hire under which the Corporation or the member of the CRS Group, as the case may be, is the inventor for patent purposes and first author for copyright purposes. All such patents shall be the property of, and copyright will vest in, the Corporation or the relevant member of the CRS Group, as the case may be. The Executive hereby waives all moral rights that the Executive may have in the Intellectual Property and the Executive agrees that this waiver may be invoked by the Corporation and by any of its authorized agents or assignees in connection with any use by them of any of the Intellectual Property. The Executive agrees that the Executive will execute all such instruments and do all such things as may be reasonably necessary or

desirable to give full effect to the foregoing and will co-operate and assist the Corporation and the •Group in enforcing their rights under this paragraph.

16. Certain Warranties, Covenants and Remedies

(a) The Executive agrees that the obligations of the Executive as set forth in sections 11, 12, 13, 14 and 15 will be deemed to have commenced as of the date of this Agreement

(b) The Executive acknowledges that a breach or threatened breach by the Executive of any of sections 11, 12, 13, 14 and 15 will result in the Corporation and its shareholders suffering irreparable harm which is not capable of being calculated and which cannot be fully or adequately compensated by the recovery of damages alone. Accordingly, the Executive agrees that the Corporation will be entitled to interim and permanent injunctive relief, specific performance and other equitable remedies, in addition to any other relief to which the Corporation may become entitled.

(c) The Executive's obligations under each of sections 11, 12, 13, 14 and 15 are to remain in effect in accordance with their terms and will exist and continue in full force and effect notwithstanding any breach or repudiation, or alleged breach or repudiation, of this Agreement by the Corporation.

17. Co-Operation By Executive

If a question arises as to whether the Executive has a Disability, the Executive will co-operate in all respects with the Corporation to determine such

question. Without limitation, the Executive will authorize the Executive's medical doctor or other health care specialist to discuss the condition of the Executive with the Corporation and the Executive will as reasonably requested by the Corporation submit to examination by a medical doctor or other health care specialist selected by the Corporation.

18. Notices

Any notices or other communication required or permitted to be given hereunder must be in writing, delivered by facsimile or by hand-delivery as hereinafter provided. Any such notice or other communication, if sent by facsimile, will be deemed to have been received on the Business Day following the sending, or if delivered by hand to the Executive will be deemed to have been received at the time it is delivered to him or, if delivered to the Executive or the Corporation at applicable address noted below, when it is delivered either to the individual designated below or to an individual at such address having apparent authority to accept deliveries on behalf of the addressee. Notice of change of address will also be governed by this section. Notices and other communications must be addressed as follows:

(a) if to the Executive:

as set out in Schedule "A"

(b) if to the Corporation:

CRS Robotics Corporation
5344 John Lucas Drive
Burlington, ON L7L 6A6

Attention: President & CEO
Fax number: (905) 332-6385

19. Headings

The inclusion of headings in this Agreement is for convenience of reference only and is not to affect the construction or interpretation hereof.

20. Invalidity of Provisions

Each of the provisions contained in this Agreement is distinct and severable and a declaration of invalidity or unenforceability of any provision by a court of competent jurisdiction will not affect the validity or enforceability of any other provision hereof.

21. Entire Agreement

This Agreement constitutes the entire agreement between the parties pertaining to the subject matter of this Agreement. This Agreement supersedes and replaces all prior agreements, if any, written or oral, with respect to the Executive's employment by the Corporation or the CRS Group and any rights which the Executive may have by reason of any such prior agreement or by reason of the Executive's prior employment, if any, by the Corporation or the CRS Group.

22. Waiver, Amendment

Except as expressly provided in this Agreement, no amendment or waiver of this Agreement will be binding unless executed in writing by the party to be bound thereby. No waiver of any provision of this

Agreement will constitute a waiver of any other provision nor will any waiver of any provision of this Agreement constitute a continuing waiver unless otherwise expressly provided.

23. Governing Law

This Agreement will be governed by and construed in accordance with the laws of the Province of Ontario.

24. Counterparts

This Agreement may be signed in counterparts. Each counterpart will constitute an original document and all counterparts, taken together, will constitute one and the same instrument. Executed counterparts may be delivered by fax.

25. Schedules

Schedules "A" and "B" form part of this Agreement.

26. Acknowledgement

The Executive acknowledges that

(a) the Executive has had sufficient time to review and consider this Agreement thoroughly;

(b) the Executive has read and understands the terms of this Agreement and the Executive's obligations hereunder;

(c) the Executive has been given an opportunity to obtain independent legal advice, or such

other advice as the Executive may desire, concerning the interpretation and effect of this Agreement; and

(d) the Agreement is entered into voluntarily by the Executive.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED THIS AGREEMENT ON THE 3RD DAY OF DECEMBER, 2001.

CRS ROBOTICS CORPORATION

PER /s/ _____
A.S.O.

/s/ _____
Executive Signature

/s/ Roger Hertz _____
Executive Name (Please Print)

WITNESS:
/s/ _____
/s/ _____
Witness Name (Please Print)

SCHEDULE A

TERMS OF EMPLOYMENT

1. **DATE OF AGREEMENT:**
   December 3, 2001

2. **EXECUTIVE'S NAME :**
   Roger Hertz

3. **ADDRESS OF EXECUTIVE:**
   5028 Penman Lane
   Burlington, ON L6L 6J4

4. **POSITION OF EXECUTIVE:**
   Director Research & Development

5. **DUTIES:**

   (a) devote his full time and attention and his best efforts during normal business hours to the Business of the Corporation;

   (b) perform those duties that may reasonably be assigned to the Executive as the Director Research & Development of the Corporation diligently and faithfully to the best of the Executive's abilities and in the best interests of the Corporation;

   (c) use his best efforts to promote the interests and goodwill of the Corporation;

   (d) appropriately divide his time between the North American and European operations of

the Corporation as may be determined by the President;

(e) responsible for assisting in the implementation of the short and long range goals, objectives, strategies and policies, established by the Board of Directors or the President;

(f) responsible for developing new products to meet company goals, the technical content of CRS products and systems, and for technical aspects of business development. Ensures organization adhere to its technical strategy and prepares budgets for R&D projects.

The Executive recognizes that the President may vary these responsibilities at any time to meet the changing needs of the Corporation.

7. **REPORTING RESPONSIBILITIES:** report to the President & CEO.

8. **TERM:** Minimum of one year and automatically extended thereafter on a year to year basis, subject to termination rights set out in the Agreement. The Term shall commence on December 3, 2001.

9. **REMUNERATION:**

(a) **Salary:** $95,000 per annum. To be reviewed after the Adjusted Year of Employment and each Year of Employment thereafter.

(b) **Gross Annual Bonus:** a discretionary bonus payable in the sole and absolute discretion of

the Human Resource and Compensation Committee of up to 30% of the Salary as set out in paragraph 9(a) and as amended from time to time, provided certain milestones established by the Human Resource and Compensation Committee at the beginning of the Adjusted Year of Employment and each Year of Employment thereafter are met. Any discretionary bonus payable will be paid to the Executive within 90 days following the end of the Adjusted Year of Employment or each Year of Employment thereafter. The Corporation and the Executive agree to negotiate in good faith with due dispatch after the execution of the Agreement to establish the milestones which will determine the Executive's bonuses.

(c) Benefits:

(i) **Incidental Vehicle, Mileage and Expense Reimbursement Allowance:** The Executive shall receive a monthly vehicle allowance of $500, plus reimbursement of all reasonable vehicle expenses incurred in connection with the Executive's duties, including gasoline, oil, maintenance and repairs of the vehicle. The Executive shall provide written receipts supporting such expenditures to the Corporation.

(ii) **Telephone:** The Executive shall be provided with a cellular telephone with all line charges related to the Executive's duties paid by the Corporation.

(iii) **Vacation period:** 3 weeks during the Adjusted Year of Employment and 3 weeks during each Year of Employment thereafter. The vacation period is not subject to an earn-in period. Any unused days of a vacation period will be subject to the policy of the Corporation.

(iv) **Corporation's Standard Benefit Entitlement:** The Executive shall be entitled to the benefits which other senior executives are entitled to including:

- long term disability
- life insurance
- supplemental health and dental
- any additional improvements or additions to the benefits

(v) **Laptop Computer:** The executive will be supplied with a laptop computer to be used in connection with the Executives duties.

(d) **Adjusted Year of Employment:** Notwithstanding the foregoing, during the Adjusted Year of Employment, the Salary as set out in paragraph 9(a) of Schedule "A", the Gross Annual Bonus as set out in paragraph 9(b) of Schedule "A" and the Benefits as set out in paragraph 9(c) of Schedule "A" shall be adjusted on a prorated basis adjusted either on a daily, weekly or monthly basis as applicable.

SCHEDULE B

TERMINATION

1. **Termination of the Executive**

   (a) **By the Executive:** The Executive's employment may be terminated at any time on 60 days' prior written notice.

   (b) **By the Corporation:** In any case other than those set out in sections 9(a)(i) and 9(a)(ii), the Executive's employment may be terminated at any time by the Corporation on 3 months' prior written notice.

2. **Lump Sum Payment**

   Amount equal to the number of months of Salary, bonus entitlement (based on the previous year's bonus) and benefits (to the extent they are available to the Executive under the Corporation's benefit plans), as set out:

   (i) during the first 12 months of the Term: 12 months

3. **Named Beneficiary of the Executive:**

   (i) Susan Hertz;

   (ii) if Susan Hertz predeceases the Executive, then equally to the Executors' children.

4. **Reduction of Severance Payment:**
Any payments on account of the severance payment which are not yet required to be paid under section 9 shall be reduced by the amount of any remuneration received by the Executive for employment rendered by him following any termination by the Corporation hereunder. For example, if the severance payment is $70,000.00 (Cdn.) and the Executive is receiving severance instalments every two weeks in the amount of $5,385.00, then if the Executive finds employment one month following any termination hereunder and receives remuneration at a rate of $3,000.00 every two weeks, then any payments otherwise due by the Corporation on account of the severance payment will be reduced to $2385.00 for every two week period during which the Executive continues to receive such remuneration .The Executive agrees to immediately notify the Corporation if he obtains employment or consulting work following his termination and shall also respond to all reasonable enquiries of the Corporation (including enquiries by the Corporation of any employer of the Executive concerning the Executive's employment following his termination hereunder). The Executive shall be subject to a reduction in the severance payment for monies received for consulting work which exceed the sum of $10,000.00.

University of Toronto

This is to certify that

Roger Barry Hertz

has fulfilled the requirements of the University of Toronto and has been admitted under the authority of the Governing Council of the University of Toronto to the degree of

Doctor of Philosophy

In witness whereof we have hereto subscribed our names and affixed the academic seal of the University:

JUNE 11, 1998

/s/
PRESIDENT

/s/
DEAN OF THE SCHOOL OF GRADUATE STUDIES

/s/
SECRETARY OF THE GOVERNING COUNCIL

University of Saskatchewan

We the duly authorized officers of the University of Saskatchewan hereby certify that

Roger Barry Hertz

having fulfilled all the requirements, was admitted by the Senate of this University to the degree of

Bachelor of Science in Mechanical Engineering

with all privileges, prerogatives and rights pertaining to that degree. In witness whereof we have hereto subscribed our names and affixed the seal of the University of Saskatoon. Granted at Convocation this twenty-third day of May, one thousand nine hundred and ninety.

Great Distinction

/s/ _____ *Chancellor*

/s/ _____ *President*

/s/ _____ *Dean*

/s/ _____ *Secretary*

Approved SCAO OSM CODE: LET

STATE OF MICHIGAN
PROBATE COURT
COUNTY OF EATON

LETTERS OF AUTHORITY FOR PERSONAL REPRESENTATIVE

File No. 05-39159-DE

Estate of Roger Barry Hertz, Deceased

TO: Name, address, and telephone no.

Susan Hertz
5230 Rome Crescent
Burlington, Ontario L7L7B7
(905) 331-9934

You have been appointed and qualified as personal representative of the estate on 02/23/2005. You are authorized to do and perform all acts authorized by law except as to the following:

[ ] Real estate or ownership interests in a business entity excluded from your responsibilities in your acceptance of appointment

[ ] Restrictions and limitations:

[ ] These letters expire: no expiration date

02/28/2005 /s/
Date Judge (formal proceedings)/Register (informal proceedings) Bar no.

SEE NOTICE OF DUTIES ON SECOND PAGE.

The Findling Law Firm
Darren Findling P51350
Attorney name (type or print) Bar no.

415 S. West St., Suite 200
Address

Royal Oak, MI 48067 (248) 399-3300
City, state, zip Telephone no.

I certify that I have compared this copy with the original on file and that it is a correct copy of the original and that these letters are in full force and effect as of the date on the letters.

02-28-2005 /s/
Date Register

Do not write below this line - For court use only

MCL 700.3103, MCL 700.3307, MCL 700.3414, MCL 700.3504, MSL 700.3601, MCR 5.202(A), MCR 5.206, MCR 5.307, MCR 5.310

PC 572 (9/02) LETTERS OF AUTHORITY FOR PERSONAL REPRESENTATIVE

CERTIFICATE OF DEATH

[*See fold-out exhibit, next page*]

4249

DEPARTMENT OF COMMUNITY HEALTH

CERTIFICATE OF DEATH

STATE FILE NUMBER 2675510

1. DECEDENT'S NAME: Roger Barry Hertz	2. DATE OF BIRTH: February 14, 1968	3. SEX: Male	4. DATE OF DEATH: May 31, 2004
5. AT BIRTH OR OTHER NAME USED FOR PERSONAL BUSINESS	5a. AGE: 36	5b. UNDER 1 YEAR: MONTHS / DAYS	5c. UNDER 1 DAY: HOURS / MINUTES
6. PLACE OF DEATH: eld off Scipio Hwy. 2½ Mi west Vermontville	6a. CITY, VILLAGE, OR TOWNSHIP OF DEATH: Vermontville Twp.	6b. COUNTY OF DEATH: Eaton	
7. RESIDENT RESIDENCE: ?? Ontario, Canada	7a. COUNTY: Halton	7b. LOCALITY: ☒ City ☐ Township ☐ Unincorporated Burlington	7c. STREET AND NUMBER: 5230 Rome Crescent
7d. ZIP CODE: ?7L-7B7	8. BIRTHPLACE: Saskatoon, Saskatchewan	9. SOCIAL SECURITY NUMBER: 638 141 - 952	10. DECEDENT'S EDUCATION: PHD - University
11. RACE: White	11a. ANCESTRY: Canadian	12a. HISPANIC ORIGIN: No	12b. WAS DECEDENT EVER IN THE U.S. ARMED FORCES?: No
13. USUAL OCCUPATION: Engineer	14. KIND OF BUSINESS OR INDUSTRY: Robotics	15. MARITAL STATUS: Married	16. NAME OF SURVIVING SPOUSE: Susan Mary Heineman
17. FATHER'S NAME: Harry Hertz	18. MOTHER'S NAME BEFORE FIRST MARRIED: Eileen Cardell		
19. INFORMANT'S NAME: Susan Hertz	19a. RELATIONSHIP TO DECEDENT: spouse	19b. MAILING ADDRESS: 5230 Rome Crescent, Burlington, Ontario, Canada	
20. METHOD OF DISPOSITION: Burial	20a. PLACE OF DISPOSITION: Burlington Memorial Gardens	20b. LOCATION: Burlington, Ontario Canada	
21. SIGNATURE OF MORTUARY SCIENCE LICENSEE	21a. LICENSE NUMBER: 6172	21b. NAME AND ADDRESS OF FUNERAL FACILITY: South's Funeral Service 485 Brant St. Burlington, Ontario, Canada	
22. CERTIFIER: S. K. Heinman	22a. ACTUAL OR PRESUMED TIME OF DEATH: 1450 H	22b. PRONOUNCED DEAD ON: May 31 2004	22c. TIME PRONOUNCED DEAD: 2 30 P M
22d. DATE SIGNED: June 4 2004	22e. LICENSE NUMBER: 25934	22f. MEDICAL EXAMINER CONTACTED?: Yes	22g. PLACE OF DEATH: Street
22h. MEDICAL EXAMINER'S CASE NUMBER: yes	22i. NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER:	22j. IF HOSPITAL:	
23. NAME AND ADDRESS OF CERTIFYING PHYSICIAN: R.L. Looser, M.D., 123 Lansing St., Ste 3, Charlotte, MI 48813			
24. REGISTRAR'S SIGNATURE: M. Frances Fuller/County Clerk	24a. DATE FILED: June 4, 2004		

25. PART I. Enter the chain of events - diseases, injuries, or complications - that directly caused the death. DO NOT enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. Enter only one cause on a line.

a. Multiple Trauma Injuries — Immediate Cause (Final disease or condition resulting in death)

b. due to (or as a consequence of): Accident — Sequentially list conditions, if any, leading to the immediate cause. Enter the UNDERLYING CAUSE (disease or injury that initiated the events resulting in death) LAST

c. due to (or as a consequence of):

d. due to (or as a consequence of):

Part II. Other significant conditions contributing to death but not resulting in the underlying cause given in Part I.

26. MANNER OF DEATH	27. WAS AN AUTOPSY PERFORMED?	27a. WERE AUTOPSY FINDINGS AVAILABLE PRIOR TO COMPLETION OF CAUSE OF DEATH?	27. DID TOBACCO USE CONTRIBUTE TO DEATH?	28. IF FEMALE:
Accident	Yes	yes	☐ Yes ☐ Probably ☐ No ☒ Unknown	☐ Not pregnant within past year ☐ Pregnant at time of death ☐ Not pregnant, but pregnant within 42 days of death ☐ Not pregnant, but pregnant 43 days to 1 year before death ☐ Unknown if pregnant within the past year

29. DATE OF INJURY	29a. TIME OF INJURY	29b. DESCRIBE HOW INJURY OCCURRED	
31 2004	14?? P M	Passenger in airplane - Rose and Crash	
30. PLACE OF INJURY: Home	30a. PLACE OF INJURY: At home, farm, street, industrial site, school, etc.: Brown field	31. IF TRANSPORTATION INJURY: Driver/operator, passenger, pedestrian, etc.: passenger	31g. LOCATION: Street or R.F.D. No. City, Village or Twp. State: Field off Scipio Hwy 2½ Mile west Vermontville Mich

County of Eaton)
State of Michigan) s.s.

I, M. Frances Fuller, Clerk of the Circuit Court for Said County of Eaton do hereby certify that the foregoing is a true copy of a record now remaining in the office of the Clerk of Said County and Court. In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at County, at the City of Charlotte, this 4th day of June A.D., 2004

By _____ Deputy Clerk

SUSAN HERTZ

Bell

Account number 905 331 9934 (654)
Bill date July 16, 2004

0331 9934 65401 004

Account Summary

Long distance savings and discounts with Bell this month:
$ 109.91

Previous charges		
	Amount of last bill	304.45
	Payment received Jul 08 - Thank You	304.45cr
	Adjustments	.00
	Balance forward	.00

Current charges		
	Monthly services (Jul 16 to Aug 15)	78.04
	Equipment rentals (Jul 16 to Aug 15)	.00
	Changes	2.40
	Chargeable messages	4.85
	Late payment charge	1.57
	GST 100458652	5.96
	PST	6.83
	Total current charges	99.65

Total amount due **99.65**

Please pay upon receipt. To avoid a Late Payment Charge, please ensure we receive your payment on or before Aug 16, 2004.

To reach toll free		
	Bell Direct™ 24 h	310-BELL (2365)
	Vista 350, press Services or by Internet	www.bell.ca
	Client Representative during business hours	310-BELL (2355)
	24-Hour Repair Service	611

Bell

0331 9934 65401 004

Account number	Bill date	Amount due	Amount paid
905 331 9934	2004 07 16	99.65	

For Bell use 654 1 80 *011**CBSO*RLBH**000037023

53 11-00036

E
T14

Please send payment to address on reverse side - do not staple.

SUSAN HERTZ
5230 ROME CRES
BURLINGTON ON
L7L 7B7

00515119934532000654704071600004100000000099652

Account number 905 331 9934 (654)
Bill date July 16, 2004

Changes

Services and equipment	Monthly rate	Days	Amount
Jun 10 Order #: CR068591 Addition			
1 Telemarketing exclusion code	.00	38	.00
1 Non published listing service	2.00	38	2.40
Changes			2.40

Chargeable messages

	Date	Location called		Number	Start	Duration (min)	Code*	Charges	Savings and/or Discounts	Plan Type**	Amount
331 9934											
	Long distance calls (Your plan savings appear in the summary - chargeable messages, if applicable.)										
1										M	.00
2										M	.00
3										M	.00
4										M	.00
5										M	.00
6										M	.00
7										M	.00
8										M	.00
9										M	.00
10										M	.00
11										M	.00
12										M	.00
13										M	.00
14										M	.00
15										M	.00
16										M	.00
17	Jun 25	St Charles	IL	630 377 8177	10:56	11	B	6.40	6.40	0¢M	.00
18										¢M	.00
19										¢M	.00
20										¢M	.00
21										¢M	.00
22										¢M	.00
23										M	.00
24										M	.00
25										M	.00
26										M	.00
27										M	.00
28										M	.00
29										M	.00
30										M	.00
31										M	.00
32										M	.00
33										M	.00
34										M	.00
35										M	.00
36										M	.00
37										M	.00
38										M	.00
39										M	.00

BEST AVAILABLE COPY

APPENDIX G

U.S. Department
of Transportation
Federal Aviation
Administration

Office of the Chief Counsel
800 Independence Ave., SW.
Washington, DC 20591

June 15, 2006

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED
Receipt Number: 7004 1160 0004 8479 6133

Sheldon L. Miller, Esq.
Sheldon L. Miller & Associates
3000 Town Center, Suite 1700
Southfield, MI 48075-1188

Re: Claim of Estate of Roger Barry Hertz, deceased, by and through his Personal Representative, Susan Hertz, arising out of the crash of N707SH near Vermontville, Michigan on May 31, 2004
Our Docket # 06-006

Dear Mr. Miller:

On June 9, 2006, we received by facsimile a copy of the claim you submitted on behalf of the above claimant. (See Attachment #1, facsimile cover page). Thereafter,

on June 12, 2006, we received a copy of the same claim by UPS overnight. (See Attachment #2, UPS Tracking Summary).

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2401(b), 2671, et seq, is a limited waiver to the Federal government's sovereign immunity, and sets forth the conditions under which it has consented to be sued in actions arising under tort. 28 U.S.C. § 2401(b) provides in pertinent part that, "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . ."

The above claim accrued on May 31, 2004 (the date of the subject accident). Because it was received more than 1 week after the 2-year limitations period expired, it is not eligible for consideration under the FTCA and, therefore, must be denied.

Should you wish to contest this determination, you must initiate action in the appropriate United States District Court, pursuant to the provisions of the Federal Tort Claim Act 28 USC Sections 1346(b), 240(b), and 2671, et seq., not later than six months after the date of mailing of this notification.

Sincerely,

/s/
Richard H. Saltsman
Assistant Chief Counsel
Litigation Division

Enclosures

Supreme Court, U.S.
FILED
OCT 29 2009
OFFICE OF THE CLERK

No. 09-26

In the Supreme Court of the United States

SUSAN HERTZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROGER B. HERTZ, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
THOMAS M. BONDY
NICHOLAS BAGLEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's claim under the Federal Tort Claims Act accrued on the date that her husband was killed in a plane crash, and not on the date that petitioner learned that negligence on the part of federal employees might have played a role in the accident.

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In the Supreme Court of the United States

No. 09-26

SUSAN HERTZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROGER B. HERTZ, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 560 F.3d 616. The opinion of the district court (Pet. App. 8a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2009. The petition for a writ of certiorari was filed on June 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States with respect to certain claims sounding in tort. See 28 U.S.C. 1346(b),

2674. The FTCA's limited waiver of sovereign immunity is coupled with a strict statute of limitations: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. 2401(b).

2. Petitioner's husband was a passenger on an amateur-built experimental airplane that crashed on May 31, 2004, killing all aboard. Shortly thereafter, on June 25, 2004, petitioner learned from an investigator with the National Transportation Safety Board (NTSB) that air traffic controllers may have been at least partly responsible for the crash. Pet. App. 2a.

On June 9, 2006, more than two years after the crash, petitioner submitted an administrative claim to the Federal Aviation Administration (FAA) seeking money damages for her husband's death. The FAA denied the claim as untimely because it fell outside the FTCA's two-year statute of limitations. Pet. App. 3a.

3. Petitioner then filed this action in the United States District Court for the Eastern District of Michigan, contending that her FTCA claim accrued not on the date of the plane crash, but on the date that she learned that the negligence of air traffic controllers may have played a role in her husband's death. Pet. App. 3a, 9a.

The district court granted the United States' motion to dismiss. Pet. App. 8a-11a. The court first pointed out that petitioner's husband was killed in the plane crash on May 31, 2004, and that petitioner "knew of both her husband's death and the cause of death at that time." *Id.* at 9a. The court then explained that this Court in *United States* v. *Kubrick*, 444 U.S. 111 (1979), which involved medical malpractice, explicitly rejected the contention that a claim accrues only when a plaintiff

becomes aware that his injury was negligently inflicted. Pet. App. 10a. The district court also pointed out that "Hertz had ample opportunity, 22 months, in which to file her claim even *after* she spoke with FAA officials in June 2004." *Ibid.*

4. The Sixth Circuit affirmed. Pet. App. 1a-7a. The court of appeals began by noting that "the 'general rule' is that 'a tort claim accrues at the time of the plaintiff's injury,'" *id.* at 3a (quoting *Kubrick*, 444 U.S. at 120), and that the question in this case is therefore whether there should be an exception to the rule. In this regard, the court noted that "a claim accrues when a plaintiff possesses enough information with respect to her injury that, had she sought out independent legal and expert advice at that point, she should have been able to determine in the two-year period whether to file an administrative claim." *Id.* at 4a-5a (internal quotation marks, brackets and citation omitted). The court found no reason to believe that petitioner could not have determined within the two-year period whether to file a claim. The court reasoned that "[p]lane crashes by their nature typically involve negligence *somewhere* in the causal chain; and the mere fact of the event is thus typically enough to put the plaintiff on inquiry notice of his claim." *Id.* at 5a. And, the court continued, "[t]he record makes plain—and [petitioner] herself concedes—not only that she should have been able to determine in the two-year period whether to file a claim, but that she in fact *made* that determination * * * less than a month after the crash." *Id.* at 6a. Under these circumstances, the court of appeals found "no reason to depart from the general rule that accrual occurs upon injury," and that it thus "lack[ed] authority to overlook" peti-

tioner's failure "to file the claim in the remaining 22 months of the period prescribed by Congress." *Ibid.*

ARGUMENT

Petitioner maintains that her FTCA claim accrued only when she learned that federal employees might have been responsible for the plane crash, and not when the accident actually occurred. In correctly rejecting that contention, the court of appeals did not create a conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. This Court recognized in *United States* v. *Kubrick*, 444 U.S. 111 (1979), that the "general rule" under the FTCA is that "a tort claim accrues at the time of the plaintiff's injury," *id.* at 120, although in the medical malpractice context of that case it concluded that the claim accrued when the plaintiff knew of the medical condition and its cause, the administration of an antibiotic. See *id.* at 120-121. In this case, petitioner learned of both the injury (her husband's death in a plane crash) and the cause of his death (the plane crash) on May 31, 2004, the date on which the accident occurred. Her FTCA claim therefore accrued, and set the statute of limitations running, on that date. Because her administrative claim was filed more than two years later, her FTCA claim is "forever barred" under 28 U.S.C. 2401(b).

Petitioner nonetheless contends that her claim was timely because it was filed within two years of learning from an NTSB official that air traffic controller negligence might have contributed to her husband's death. For purposes of FTCA accrual, however, *Kubrick* distinguished—even in the medical malpractice context—between the moment that a plaintiff learns of the inflic-

tion of injury (there, the administration of an antibiotic) and the moment that he learns of the potential breach of a duty of care (there, that the antibiotic was negligently administered). See 444 U.S. at 113, 122. An appreciation of the infliction of injury, the Court reasoned, is sufficient to put the plaintiff on notice that he should take prompt steps to ascertain whether a government employee acted negligently. *Id.* at 122-123. In so concluding, the Court explained that it "cannot hold that Congress intended that 'accrual' of a claim must await awareness by the plaintiff that his injury was negligently inflicted." *Id.* at 123.

Similarly here, when petitioner learned that her husband was killed in a plane crash, she was on notice that she should "protect h[er]self by seeking advice in the [expert] and legal community." *Kubrick*, 444 U.S. at 123. And, in fact, petitioner spoke with an NTSB investigator less than a month after the crash and garnered precisely the sort of information that could have formed the basis for a timely claim. Petitioner complains that she was unaware until speaking with the investigator that negligence on the part of federal employees might have contributed to her husband's death, but *Kubrick* specifically rejected a rule that would delay accrual "until the plaintiff knew or could reasonably be expected to know of the Government's breach of duty." *Id.* at 125. As the *Kubrick* Court explained, adoption of such a rule "would go far to eliminate the statute of limitations as a defense separate from the denial of breach of duty." *Ibid.*

The court of appeals' holding that petitioner's claim was untimely in these circumstances is consistent with the decisions of other courts of appeals. See, *e.g.*, *Kronisch* v. *United States*, 150 F.3d 112 (2d Cir. 1998) (hold-

ing that a claim alleging that a Central Intelligence Agency (CIA) official slipped lysergic acid dimethylamide (LSD) to plaintiff accrued when plaintiff first learned that the CIA had administered LSD to others around the same time); *Dyniewicz* v. *United States*, 742 F.2d 484, 486 (9th Cir. 1984) (holding that, under *Kubrick*, "the 'cause' [of an injury] is known when the immediate physical cause of the injury is discovered," and that "[d]iscovery of the cause of one's injury * * * does not mean knowing who is responsible for it"); *Garrett* v. *United States*, 640 F.2d 24 (6th Cir. 1981) (per curiam) (measuring the accrual date in a wrongful death case from the date of death).

2. Petitioner urges that the Sixth Circuit's decision conflicts with decisions of four other courts of appeals. But petitioner has identified no case presenting remotely comparable facts. This aspect of the petition is significant in light of the oft-repeated acknowledgment that "[t]he question of what knowledge should put a claimant on notice of the existence of a viable claim is not soluble by any precise formula." *Waits* v. *United States*, 611 F.2d 550, 552 (5th Cir. 1980); see *McIntyre* v. *United States*, 367 F.3d 38, 52 (1st Cir. 2004) ("This inquiry is highly fact- and case-specific, as are the pertinent questions to ask.").

Here, the Sixth Circuit reasoned that "[p]lane crashes by their nature typically involve negligence *somewhere* in the causal chain; and the mere fact of the event is thus typically enough to put the plaintiff on inquiry notice of his claim." Pet. App. 5a. Under these circumstances, the Sixth Circuit held that the accident itself and the resulting injury triggered a duty to investigate and, under *Kubrick*, started the limitations period running.

This fact-bound determination does not warrant this Court's review. None of the cases that petitioner identifies from other circuits arose out of plane crashes, or, indeed, similar incidents of any kind. Petitioner instead draws largely on three First Circuit decisions stemming from FTCA suits involving intentional murder in which the circumstances affecting the application of the inquiry notice requirement under the FTCA concerning any possible role by government employees were quite different. *McIntyre*, *supra* (Federal Bureau of Investigation (FBI) agents tipped off mobsters about informants who were murdered shortly thereafter); *Skwira* v. *United States*, 344 F.3d 64 (2003) (nurse found to have murdered patients who died in a Veterans Affairs (VA) hospital), cert. denied, 542 U.S. 903 (2004); *Attallah* v. *United States*, 955 F.2d 776 (1992) (customs officials murdered and robbed a courier traveling to Puerto Rico); see *Rakes* v. *United States*, 442 F.3d 7 (1st Cir. 2006) (FBI agent tipped off mobsters and aided extortion). Those cases have little if any bearing on determining the accrual date of a claim arising out of a plane crash.

Petitioner also discusses *Garza* v. *United States Bureau of Prisons*, 284 F.3d 930 (8th Cir. 2002). The plaintiff in *Garza* was the estate of a woman who had been murdered by her husband when he was supposed to be in a halfway house. More than two years after the murder, the estate filed a claim against the government under the FTCA. The Eighth Circuit held that the claim was untimely, rejecting the argument that the statute of limitations began running only when the plaintiff learned that the person who may have contributed to the death was a federal employee. The court explained that "the statute of limitations under the FTCA 'does not

wait until a plaintiff is aware that an alleged tort-feasor is a federal employee.'" *Id.* at 935 (quoting *Gould* v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738, 745 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991)). Far from creating a circuit split, *Garza* supports the Sixth Circuit's similar determination here that accrual of petitioner's claim "[did] not wait until [she was] aware that an alleged tort-feasor is a federal employee." *Ibid.* (quoting *Gould*, 905 F.2d at 745).

Petitioner similarly invokes a Fifth Circuit case arising out of an FTCA claim alleging malicious prosecution. See *Ramming* v. *United States*, 281 F.3d 158 (2001) (per curiam), cert. denied, 536 U.S. 960 (2002). Even assuming the accrual of a malicious prosecution claim might have a bearing on this case, the Fifth Circuit in *Ramming* adhered to the general rule that an FTCA claim accrues when the tort occurred. Consistent with the Sixth Circuit here, the court held that plaintiffs had sufficient information to start the limitations period the moment they were acquitted and a tort suit became available. In so concluding, the Fifth Circuit reiterated that the "requirement of diligent inquiry imposes an affirmative duty on the potential plaintiff to proceed with a reasonable investigation in response to an adverse event." *Id.* at 163 (citation omitted).

Finally, petitioner cites *Drazan* v. *United States*, 762 F.2d 56, 59 (7th Cir. 1985), a medical malpractice case in which plaintiff's husband died of cancer. Because the plaintiff had no reason to suspect negligent medical treatment at the time of her husband's death, the Seventh Circuit held that plaintiff's claim accrued only when she learned that negligent medical attention from a government-run hospital may have contributed to her husband's death. Here, in contrast, the Sixth Circuit

concluded that plaintiff was aware that negligence may have contributed to her husband's death on the day the plane crash occurred. Pet. App. 5a. *Drazan* therefore does not conflict with the decision below; it accords with it.

Petitioner places great weight on a statement from *Drazan*, later repeated in *Garza*, 284 F.3d at 934, and *Diaz* v. *United States*, 165 F.3d 1337, 1340 (11th Cir. 1999), that "[w]hen there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just of the other cause." *Drazan*, 762 F.2d at 59. As the context of this statement makes clear, however, the "two causes" that the Seventh Circuit had in mind were (1) the condition leading to death (cancer) and (2) that human action (the failure to take action following an x-ray) may have caused the death. The court found that knowledge as to that cause, and not merely knowledge of the cancer, triggered accrual of the FTCA claim.

In so holding, the Seventh Circuit in *Drazan* used as a shorthand the phrase "government cause"—after all, the only doctors that the plaintiff's husband there had seen were government doctors, and the cause—the failure to take action in light of the x-ray—could only have been a "government cause." But it would have been equally accurate for the Seventh Circuit to say "human cause" or "non-natural" cause. The same was true in both *Garza* and *Diaz*, where the only potential negligence arose from the conduct of prison officials. See *Jones* v. *United States*, 294 Fed. Appx. 476, 480 (11th Cir. 2008) (noting that "[t]he *Drazan* and *Diaz* cases refer to knowledge of a 'government cause' simply because the government was the defendant in those

cases"). None of the cases cited by petitioner addresses the circumstances presented here, where petitioner was immediately on notice of her husband's death in a plane crash and that negligence may have contributed to the plane crash, but was not necessarily aware of the exact source of any such negligence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

SUSAN HERTZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROGER B. HERTZ, DECEASED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

In *United States v. Kubrick*, 444 U.S. 111; 100 S. Ct. 352; 62 L. Ed. 2d 659 (1979), this Court found that a Federal Tort Claims Act ("FTCA") claim accrues when the plaintiff knows both the existence and the cause of his injury. In this case, both the Sixth Circuit and the district court focused on Plaintiff's knowledge of the injury and overlooked her inability to know who caused the injury. Pursuant to *Kubrick*, the courts below were required to base their claim accrual analysis on when Plaintiff could or should have acquired possession of the critical facts regarding who inflicted her injury. *Id.* More specifically, the Court of Appeals was required to analyze when Plaintiff should have known that government conduct may have caused the crash. That proper analysis, had it been done, would have led the Court to conclude that Plaintiff's claim accrued on June 25, 2004 and her notice of claim was timely.

Instead, when the Sixth Circuit held that "a claim accrues when a plaintiff possesses enough information with respect to her injury that, '[had] [she] sought out independent legal and [expert] advice at that point, [she] should have been able to determine in the two-year period whether to file an administrative claim,' it created a rule that conflicts with decisions of this Court and other Circuits. (Apx. 4a-6a.) Accordingly, this new claim accrual rule should be reviewed by this Court.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *KUBRICK*.

The United States argues that the Sixth Circuit's ruling is consistent with *Kubrick* in that claim accrual does not await awareness by the plaintiff that her injury was negligently inflicted. In support, the United States repeatedly mischaracterizes Plaintiff's argument as one focusing on knowledge of negligence. (See United States Opposition, p. 4-5). Specifically, the United States claims that Plaintiff "contends that her claim was timely because it was filed within two years of learning...that air traffic controller negligence might have contributed to her husband's death." (United States Opposition, p. 4.) Indeed, the United States' "Question Presented" focuses on knowledge of negligence rather than knowledge of causation. This is not only a mischaracterization of Plaintiff's argument, it is also wrong. Plaintiff does not argue, nor has she ever argued, that claim accrual awaits knowledge of negligence. Rather, her argument echoes the holding in *Kubrick* that, for purposes of claims accrual under the FTCA, knowledge of potential *government causation* (measured by an objective standard) is necessary before a claim can accrue. These are distinct arguments with different legal consequences. Whereas knowledge of negligence has no bearing on claim accrual, claim accrual is dependent on the knowledge of potential government causation. *Kubrick*, 444 US at 118-120. Plaintiff's argument is based exclusively on knowledge of causation, not negligence, as the United States argues. Plaintiff's argument is therefore entirely consistent with *Kubrick*.

Because the Sixth Circuit's holding and new claim accrual rule focuses on the date of injury without considering when Plaintiff first should have acquired knowledge of potential government causation, it conflicts with *Kubrick,* and review, and ultimately reversal, by this Court is warranted.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The Sixth Circuit's holding also conflicts with the holdings by other Circuit Courts of Appeals that claims brought under the FTCA accrue only when the plaintiff knows of the decedent's death *and* its potential causal connection with the government. As more fully set forth in Plaintiff's petition, other circuits have held that claims brought under the FTCA do not accrue until the plaintiff knew or should have known of her injury and the cause attributable to the government. The United States erroneously claims that this is not the rule in other circuits and argues that knowledge of government cause is irrelevant in plane crash cases.

The United States tries to downplay the use of the word "government cause" in the decisions of other circuit courts. Citing *Jones v. United States,* 294 Fed. Appx. 476, 480 (11th Cir. 2008), the United States argues that the phrase "government cause" was used simply because the government was the only defendant in those cases. The United States, however, took this statement out of context. In the same paragraph to which the United States cites, the *Jones* court found that "[t]he knowledge of government cause" requirement simply clarified that a plaintiff

must know of the cause attributed to the defendant for the cause of action to accrue. *Id.* In other words, where the government is the defendant, a claim does not accrue until the plaintiff knows the cause attributed to the government. Here, that cause is air traffic control conduct. Accordingly, *Jones* supports Plaintiff's claim that other circuits have held that knowledge of potential government cause is the crux of claim accrual under the FTCA and, contrary to the United States' argument, it does not refute the requirement that a claim does not accrue until there is knowledge (measured objectively) of government causation.

The United States also argues that *Garza v. United States Bureau of Prisons,* 284 F.3d 930 (8th Cir. 2002), holds that an FTCA claim does not wait to accrue until plaintiff is aware that an alleged tortfeasor is a federal employee. Although this language is found in *Garza*, the United States misleads the Court as to its application and relevance to this case. *Garza* focused on a situation where the plaintiff knows who the alleged tortfeasor is but is unaware that the tortfeasor is a federal employee. *Id.* at 935. In that situation, the claim would accrue when the plaintiff knows the identity of the alleged tortfeasor, not when she knows that the tortfeasor is employed by the government. This rule is irrelevant to the case at bar as there is no dispute as to whether Plaintiff was aware that the air traffic controllers were federal employees. Rather, the holding from *Garza* that is applicable is that when the government argues that a suit is untimely under the FTCA, the plaintiff may show that the suit is timely if "he had no reason to believe he had been injured by an act or omission by the government." *Id.* at 934. Such is the case here as Plaintiff could not have known of

potential government involvement until June 25, 2004.[1]

The United States also urges the Court to ignore the cases cited by Plaintiff that require knowledge of government causation because none of those cases involved a plane crash. Identical facts, however, are not needed for the application of the discovery rule as enunciated by various circuit courts, *i.e.*, the statute of limitations does not begin to run until the claimant knew or should have known that the actions or inactions of the government caused the injury. See *Skwira v. United States*, 344 F.3d 64, 82 (1st Cir. 2003); *Rakes v. United States*,. 442 F.3d 7, 11 (1st Cir. 2006); *McIntyre v. United States,* 367 F.3d 38, 52 (1st Cir. 2004); *Garza v. United States,* 284 F.3d 930, 934 (8th Cir. 2002); *Ramming v. United States*, 281 F.3d 158, 162-63 (5th Cir. 2001); *Drazen v. United States,* 762 F.2d 56, 59 (7th Cir. 1985). The United States tries to dismiss these holdings out of hand by stating that they "have little if any bearing on determining the accrual date of a claim arising out of a plane crash." The United States fails, however, to explain why this rule is inapplicable to this case or why plane crash cases should be treated differently.

The cases cited by Plaintiff all involved situations where, like here, the government's involvement in the tort was unknown, or more importantly, unknowable,

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[1] It is not disputed that, due to the National Transportation Safety Board's exclusive control of the accident investigation, Plaintiff did not know, nor could not have possibly known, of potential government causation until her conversation with the National Transportation Safety Board's Investigator-in-Charge on June 25, 2004.

until a specific point in time after the injury. Plaintiff could not know that the government played a role in her husband's death until June 25, 2004. Accordingly, the Sixth Circuit's failure to consider the knowledge of "government cause" in its claim accrual analysis is inconsistent with the holdings from other Circuits and contrary to the precedent set by this Court in *Kubrick*.

Lastly, the United States evades the question of knowledge of government cause by quoting the Sixth Circuit's finding that "plane crashes by their nature typically involve negligence somewhere in the causal chain; and the mere fact of this event is thus typically enough to put the plaintiff on inquiry notice of his claim." (Apx. 5a.) Even if this statement was true and supported by the record below, which it is not, it is irrelevant to the issue of claim accrual. An FTCA claim accrues only when a plaintiff is armed with sufficient facts to permit a reasonable person to believe that there is a causal connection between the *government* and their injury, not when she should have known that some pilot or aircraft manufacturer or maintenance provider at some point in time may have been negligent.

CONCLUSION

The Sixth Circuit Court of Appeals created a new rule of law that an FTCA claim arising from a plane crash accrues on the date of the crash if the claimant should have been able to determine anytime within the following two years that he or she had a claim against a governmental entity. This rule is contrary and inconsistent with this Court's holding in *Kubrick* and with several circuit courts. Accordingly, Petitioner respectfully requests that this Court grant the writ of

certiorari, review this case, and upon review, reverse the Sixth Circuit Court of Appeals' decision.

Respectfully submitted,

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